



# **Mining Federal “Golden Nuggets”**

December 3, 2020

District of Puerto Rico

 @JWagstaffeLxNx

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# Mining Tools

**FRCP &  
Title 28**

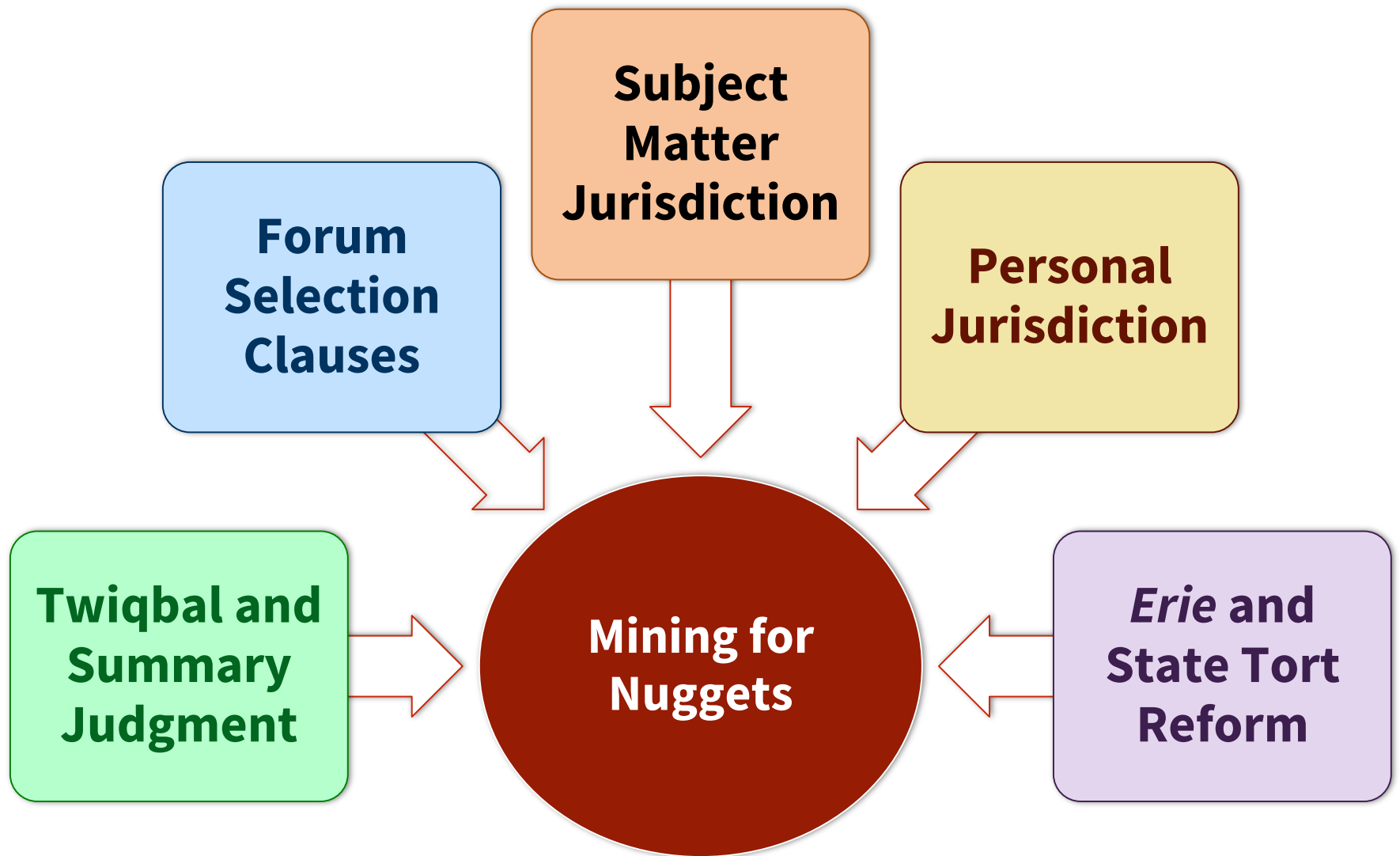


**The Wagstaffe Group  
Practice Guide: Fed. Civ.  
Pro. Before Trial  
& Current Awareness  
(LexisNexis 2020)**

**District of  
Puerto Rico**

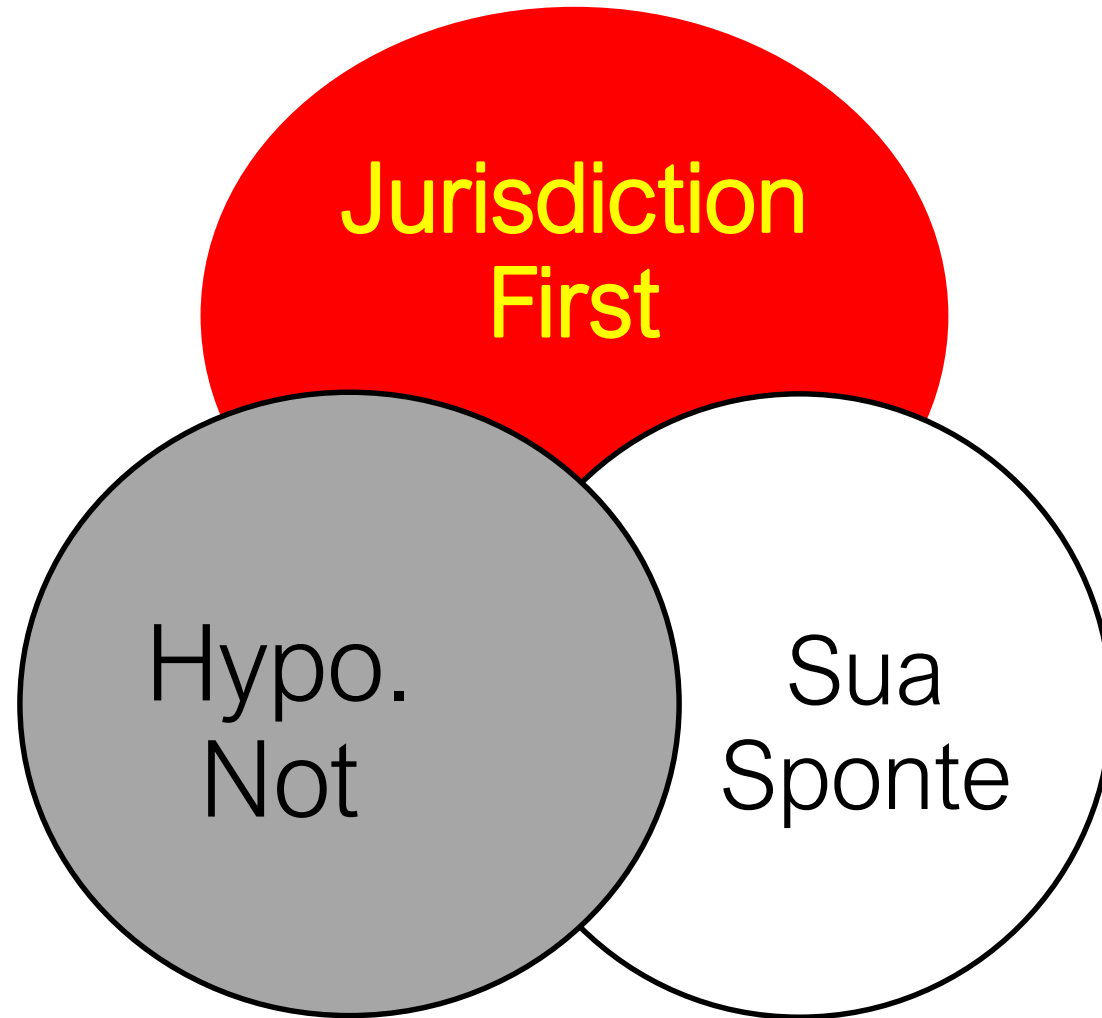
**PowerPoint Slides**

**2020  
Jurisdictional  
Update**



“Gates of federal question jurisdiction controlled by steely-eyed sentry”

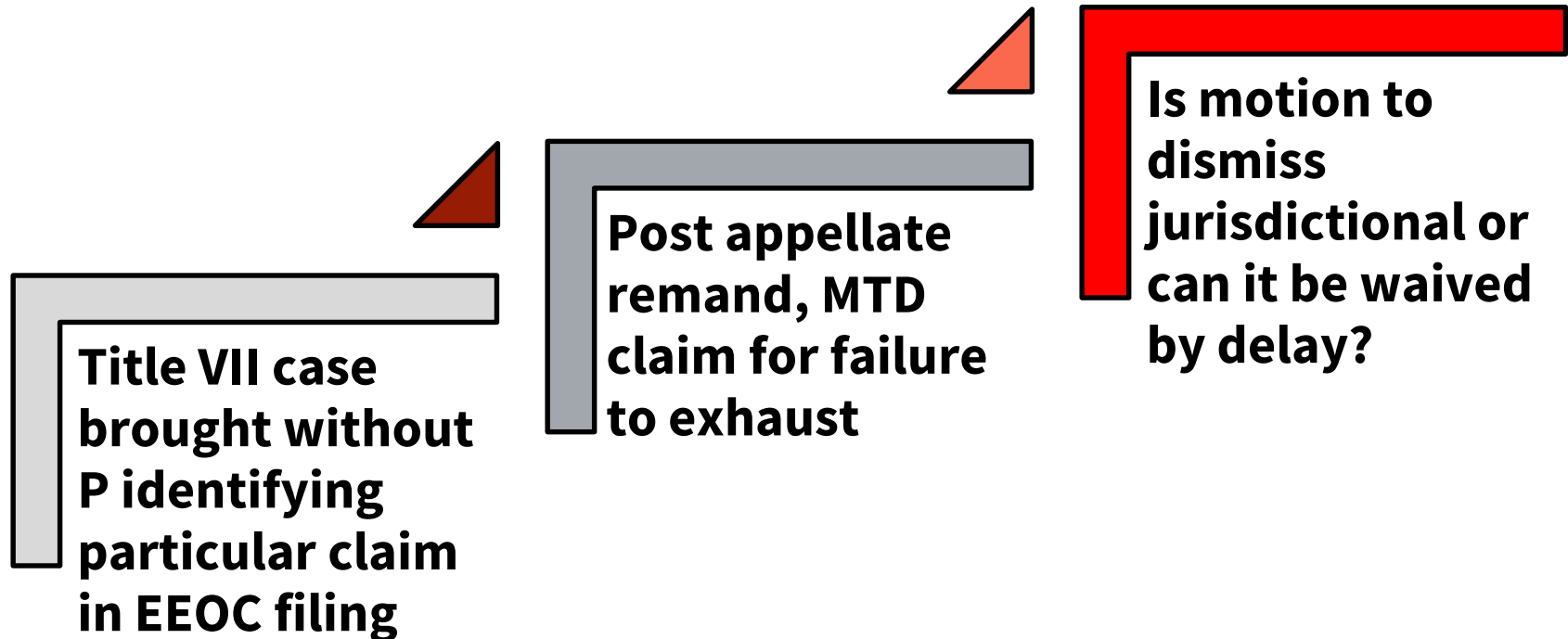
*MSO of P.R., LLC v. Med Scan, PSC* (D. P.R. 2019) 2019 U.S. Dist 111920 (Young, J.)



# **Golden Nugget #1: What is “Jurisdictional”?**

***Fort Bend County,  
Texas v. Davis (2019)  
139 S.Ct. 1843***

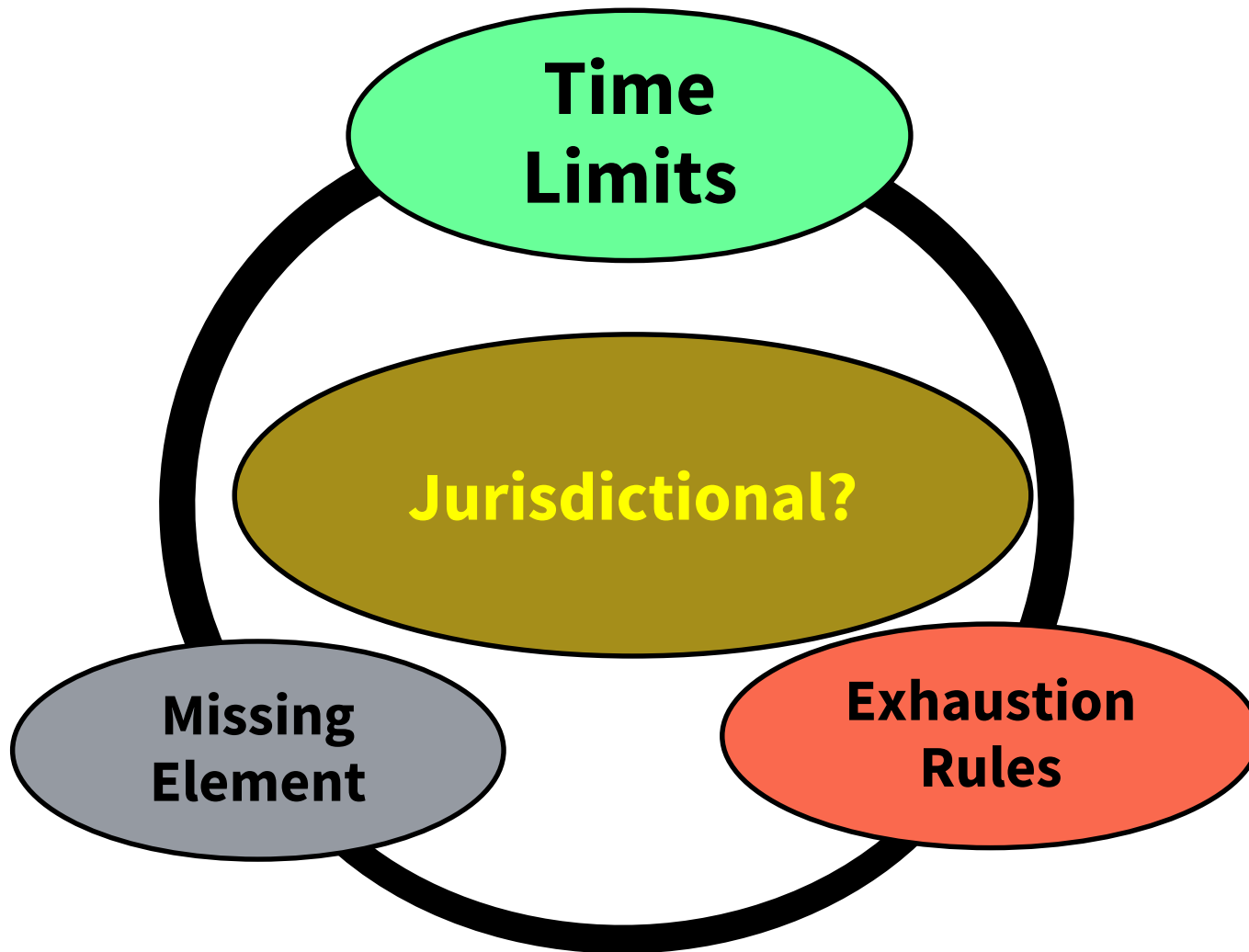
# “Jurisdictional”?



# Not Jurisdictional

- ***Fort Bend County, Texas v. Davis* (2019) 139 S.Ct. 1843**
- **Full exhaustion of remedies with EEOC is a claims processing, not jurisdictional, rule**

*See also U.S. v. Millenium Labs.* (1<sup>st</sup> Cir. 2019) 923 F.3d 240—first to file rule under FCA not jurisdictional; *Acosta-Ramirez v. Banco Popular de Puerto Rico* (1st Cir. 2013) 712 F.3d 14—time to seek judicial review of FDIC administrative ruling is jurisdictional; *Bertran v. Puerto Rico Aqueduct* (D. P.R. 2019) 2019 U.S. Dist. LEXIS 215126 (Gelpi, J.)—Clean Water Act case based on EPA’s diligent prosecution not jurisdictional



**See The Wagstaffe Group Prac. Guide: Fed. Civ. Proc. Before Trial, § 5-IV  
(LexisNexis 2020)**

## **Rule 12(b)(1)**

**No Waiver**

**Speaking  
Motion**

**No  
Supplemental  
Claims**

**Dismissed  
w/o  
Prejudice**

## **Rule 12(b)(6)**

**Can be Waived  
(Aff. Defense)**

**Non-Speaking**

**Supplemental  
Claims  
Discretionary**

**Dismissed  
with Prejudice**

# Golden Nugget #2: *Spokeo* Standing

*Thole v. U.S. Bank*  
(2020) 140 S.Ct.  
1665

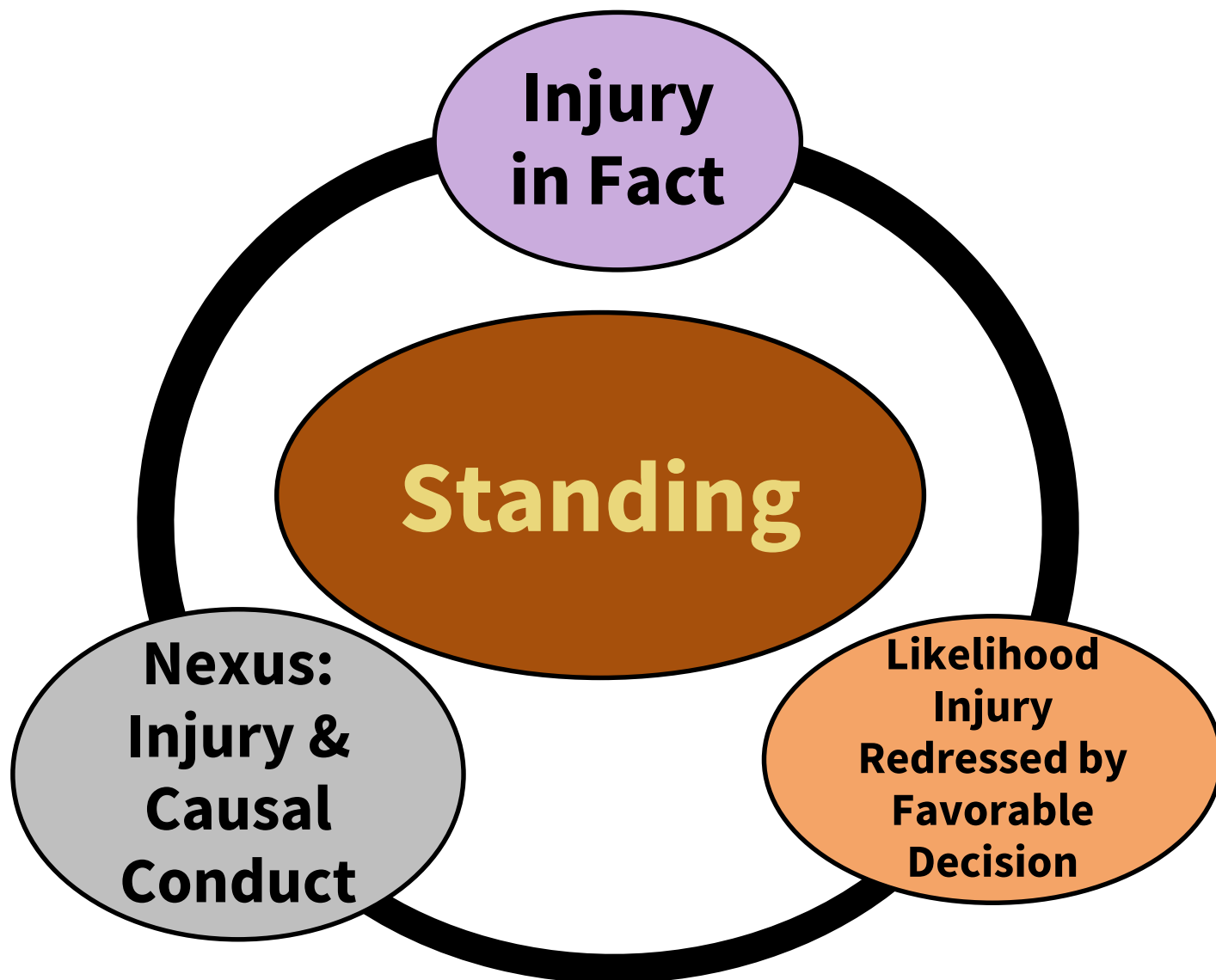
# Is there *Spokeo* Standing?



Two retired plan participants sue to challenge plan fiduciaries' investments

Retirement benefits don't fluctuate with value of plan or as a result of allegedly adverse fiduciary investments

**MTD for lack of standing?**



*Foisie v. Worcester Polytechnic Institute* (1st Cir. 2020) 967 F.3d 27—ex-wife had standing to sue eleemosynary institution to recoup assets fraudulently conveyed by ex-husband; *Lyman v. Baker* (1st Cir. 2020) 954 F.3d 351—voters have standing to challenge winner-take-all elector-selection method

# Grant

- ***Thole v. U.S. Bank* (2020) 140 S.Ct. 1665**
- **Plaintiffs lack standing as they have no concrete stake in lawsuit as outcome of suit would not affect future benefits**

See *Spokeo, Inc. v. Robins* (2016) 136 S.Ct. 1540; *Dantzler, Inc. v. Empresas Berrios* (1<sup>st</sup> Cir. 2020) 958 F.3d 38--no standing based on bare allegation that freight fees caused by defendant's conduct; *Amrhein v. eClinical* (1st Cir. 2020) 954 F.3d 328—mere inaccuracy of medical records without injury does not support standing; *ePerez-Kudzma v. U.S.* (1<sup>st</sup> Cir. 2020) 940 F.3d 142—no standing when complaint sets forth only diffuse description of injuries; see also *In re Fin'l Oversight & Mgt. Bd.* (D. P.R. 2019) 404 F.Supp.3d 536 (Swain, J.)

# Miner's Tips

- **Subject Matter Jurisdiction First**
- **Read Statute's Jurisdictional Label**
- **Distinguish Rules 12(b)(1) & 12(b)(6)**
- **Remember *Spokeo* standing is jurisdictional and apply “no harm, no foul” rule of standing in statutory violation cases**

# *FOUR DOORWAYS TO FEDERAL COURT*



Front  
Door



Visitors'  
Door



Back  
Door



Side Door





## FRONT DOOR

- Arising Under
- Not Federal Defense



## VISITOR'S DOOR

- Complete Diversi
- Amount in Controversy



## BACK DOOR

- Removal = Orig. Jurisdiction
- Squeaky Proc.



## SIDE DOOR

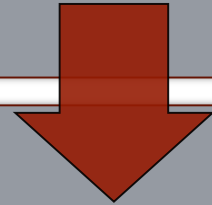
- Same Trans.
- Supplement. Claims/Parties

# Golden Nugget #3: The Missing Federal Claim

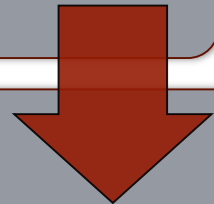
*Gunn v. Minton*  
568 U.S. 251  
(2013)

# Federal Question?

**Minton loses federal patent suit**



**Minton sues attorney Gunn for malpractice**



**Question: Motion to Dismiss for lack of Subject Matter Jurisdiction?**

# Grant

## ***Gunn v. Minton* 568 U.S. 251 (2013)**

- **Malpractice claim does not “arise under” federal law**

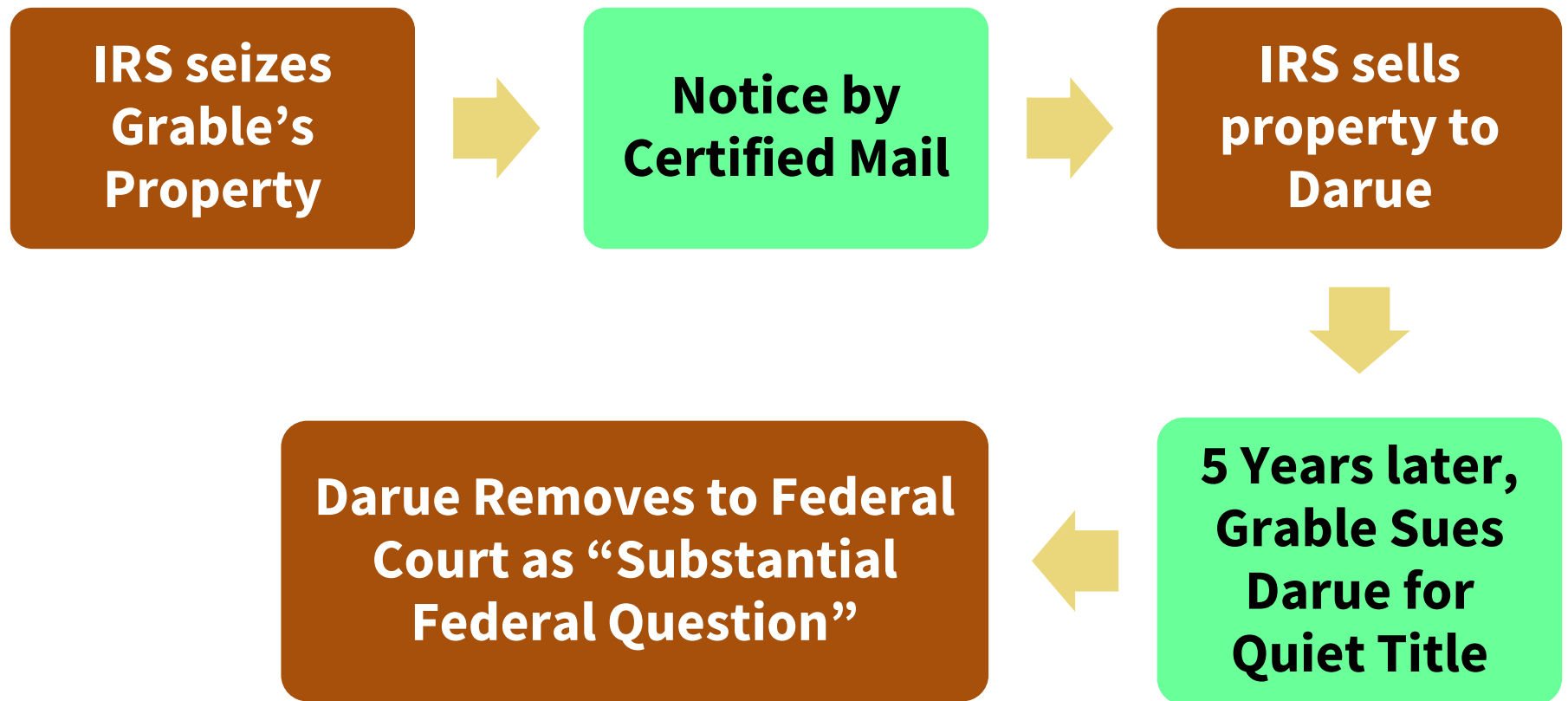
See *Narragansett Indian Tribe v. Rhode Island Dept. of Transp.* (1<sup>st</sup> Cir. 2018) 903 F.3d 26—no federal question jurisdiction over Tribe’s claim state agency broke promise concerning bridge reconstruction over historic tribal land since no claim made under National Historic Preservation Act (54 U.S.C. § 300101); *Lopez-Ramos v. Cemex de Puerto Rico* (D. P.R. 2020) 2020 U.S. Dist. LEXIS 161730 (Arias-Marxuach, J.)—no private right of action under Federal Mine Safety and Health Act (30 U.S.C. § 802); *MSO of P.R., LLC v. Med Scan, PSC* (D. P.R. 2019) 2019 U.S. Dist. LEXIS 111920 (Young, J.)—dispute requiring interpretation of federal regulations against Medicare administrator does not arise under federal law

# Arbitration – Looking Through

Federal question jurisdiction exists when, if one “looks through” petition, it is predicated on an action arising under federal law.

*Vaden v. Discover Bank* (2009) 556 U.S. 49, 62—Test: Whether, save for the arbitration agreement, jurisdiction exists over petition to compel; *Ortiz-Espinosa v. BBVA Securities of Puerto Rico, Inc.* (1<sup>st</sup> Cir. 2017) 852 F.3d 36—same approach for petition to confirm or vacate; contra *Magruder v. Fid. Brokerage Servs. LLC* (7<sup>th</sup> Cir. 2016) 818 F.3d 285

# Substantial Federal Question?



# DENY Remand Motion

- *Grable & Sons v. Darue Eng.* (2005)  
545 U.S. 308
- *Claim raises “substantial federal question”*

*One & Ken Valley Hous. Grp. v. Maine State Hous. Auth.* (1<sup>st</sup> Cir. 2013) 716 F.3d 218—“federal ingredients” allowed jurisdiction over landlords’ contract claims against Maine Housing Authority for alleged failure to provide annual increases mandated for HUD Section 8 housing

# Four Requirements – Grable “Exception”

**Necessarily raises a stated federal issue**



**Federal issue is actually disputed**



**Federal issue is substantial, i.e., important to federal system as a whole**



**Federal adjudication will not disturb congressionally authorized federal-state court balance**

*Pizarro v. Synectrust, LLC* (D. P.R. 2019) 2019 U.S. Dist. LEXIS 40972 (Cerezo, J.)—no substantial question over claim for return of confidential documents simply because copyright and patent issues in case; *Mennonite General Hospital v. Molina Healthcare* (D. P.R. 2018) 319 F.Supp.3d 587 (Gelpi, J.)—no substantial federal question if issues do not have broader significance to federal system

# Most Fun Miner's Case - 2020

- ***LN Management, LLC v. JP Morgan Chase Bank, NA* (9<sup>th</sup> Cir. 2020) 957 F.3d 943**

**Holding: You cannot sue a dead person  
(disallowing joinder of dead homeowner as party  
to HOA foreclosure action)**

Citing *U.S. ex rel Mayo v. Satan & his Staff* (W.D. Pa. 1971) 54 FR.D. 282—no personal jurisdiction over defendant; *State Senator Ernie Chambers v. God*, No. 1075-462 (Neb. Dist. Ct. Oct. 8, 2008)-- dismissing case due to impossibility of service on defendant.

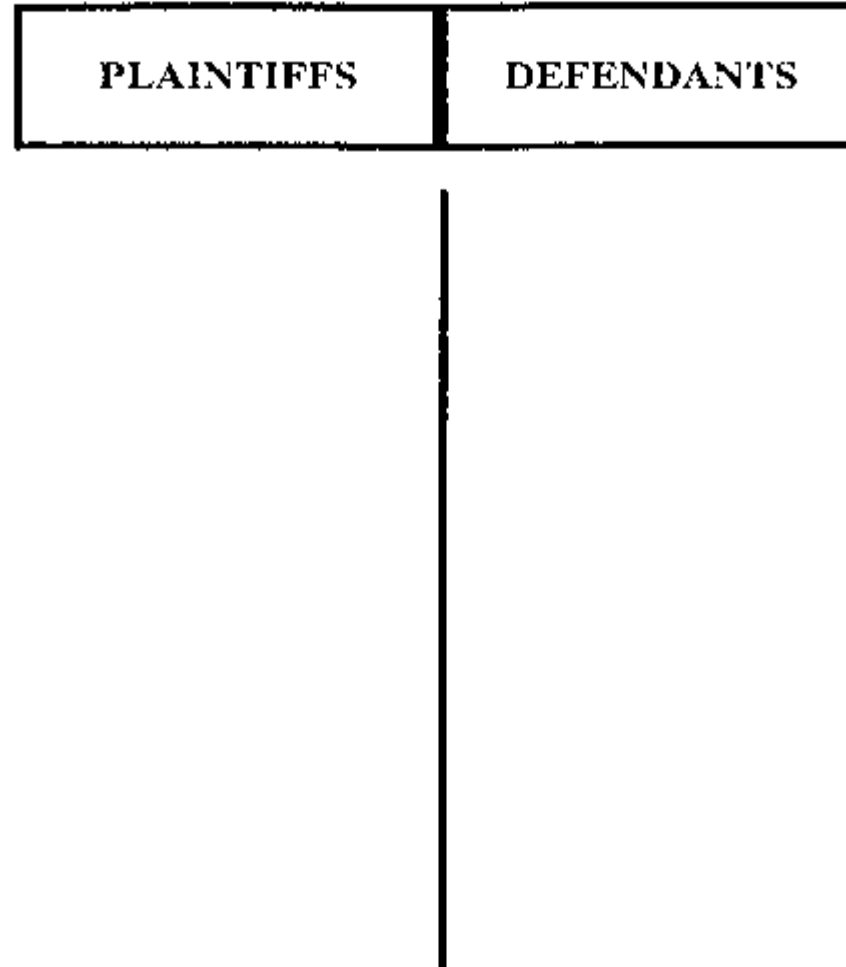
# Miner's Tips

- **Read Complaint**
- **Trust federal claims & distrust “substantial” federal issue**

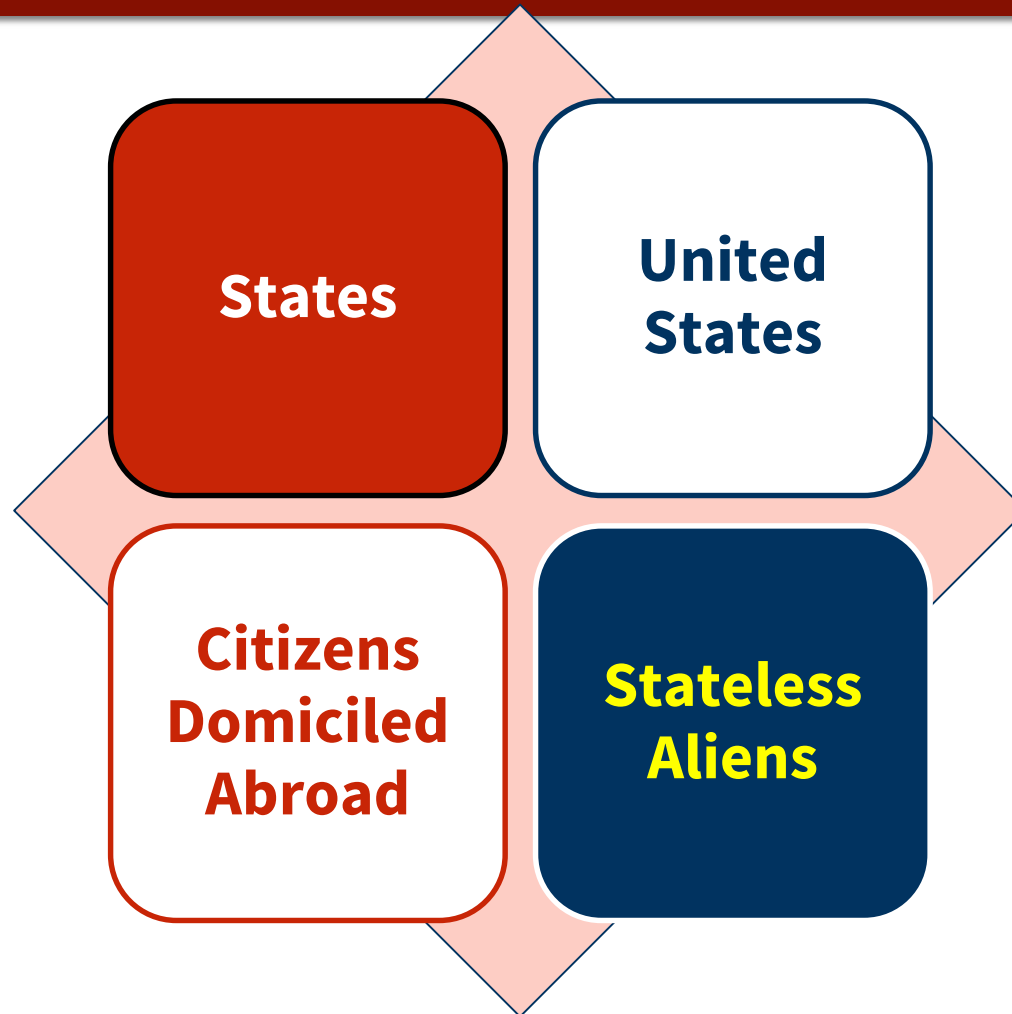
# Golden Nugget #4: Diversity: Go to Kindergarten

*Complete Diversity  
Training*

# Diversity Algebra



# Citizens – Not



*Narragansett Indian Tribe v. Rhode Island Dept. of Transp.* (1<sup>st</sup> Cir. 2018) 903 F.3d 26—  
Indian tribe is not citizen of state and thus destroys diversity

# Citizens Domiciled Abroad

See *Lapeira-Perez v. Multnat'l Life Ins. Co.* (D. P.R. 2016) (Casellas, J.)

## PLAINTIFFS

CALIF.

NJ

## DEFENDANTS

NY

TEX.

US Citizen  
Domiciled in  
UK

# Citizenship Rules

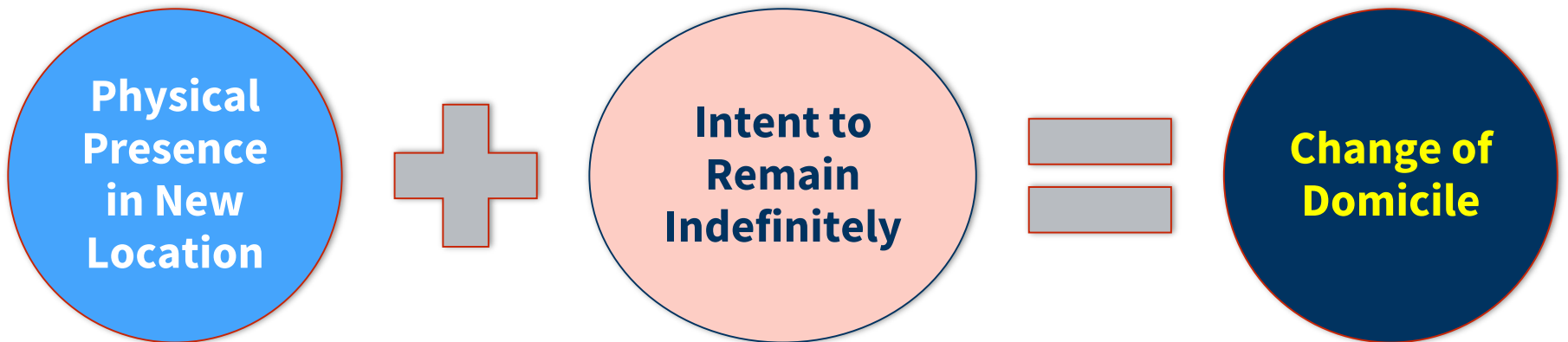
**Individuals**

**Aliens**

**Corporations**

**Other Entities**

# Individuals



# ***Facts to Consider***

Residences

Property  
Ownership

Voter  
Registration

Tax Returns

Employment

Assets  
Location

State-Issued  
Licenses

Family,  
Mail &  
Community

Representations  
In Public  
Documents

# Diversity Jurisdiction?

## Defamation Action (Portland, ME, \$14.5M verdict)

### Plaintiff

Hearts with Haiti, Inc. (NC)

Michael Geilenfeld

- Iowa: born & raised; driver's license; voter's registration; bank account
- Haiti – missionary for 20+ years; permanent resident

### Defendant

Paul Kendrick

(Freeport, ME)

# Holding – Diversity Absent

*Hearts with Haiti, Inc. v. Kendrick* (1<sup>st</sup> Cir. 2016) 856 F.3d 1

- Geilenfeld is a citizen domiciled abroad
- Diversity jurisdiction is lacking and could be raised for first time on appeal

See also *Coma v. de Cuebas* (D. P.R. 2019) 356 F.Supp.3d 198 (Gelpi, J.)—considering factors, student not domiciled at school in Florida

# Citizenship in Cases With Aliens

## No Jurisdiction Unless:

- \* Federal Question,
- \* Complete Diversity w/ Aliens as Additional Parties or
  - \* Alien(s) on one Side and Citizen(s) on other Side
- \* (No alienage jurisdiction if aliens on both sides without complete diversity between citizens)

# Alienage Jurisdiction – YES

*28 U.S.C. § 1332(a)(2)*

PLAINTIFF



**Wagstaffe  
(California)**

DEFENDANT



**Garcia  
(Mexico)**

# Diversity Jurisdiction – YES

*28 U.S.C. § 1332(a)(3)*

PLAINTIFF

DEFENDANT

**Wagstaffe  
(California)**

**Chevalier  
(France)**

**Garcia  
(Mexico)**

**Lambert  
(Virginia)**

# Diversity/Alienage Jurisdiction - NO

PLAINTIFF

**Wagstaffe  
(California)**

**Chevalier  
(France)**

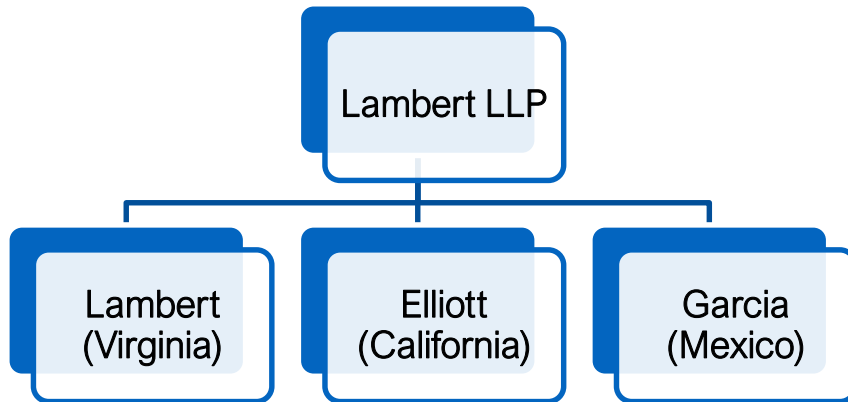
DEFENDANT

**Garcia  
(Mexico)**

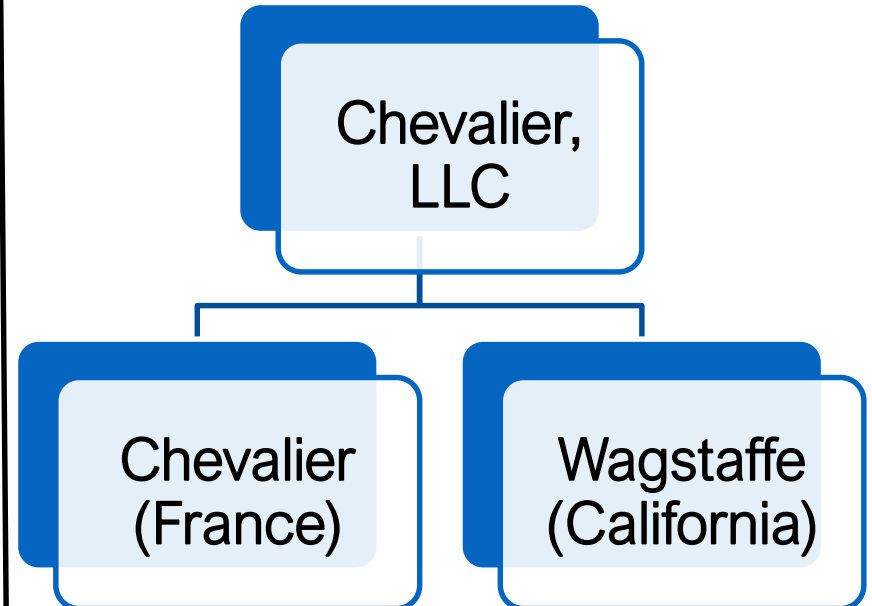
**Jones  
(California)**

# Diversity/Alienage - No

## PLAINTIFF



## DEFENDANT



# Diversity/Alienage - No

28 USC 1332(c)(1)

PLAINTIFF

Garcia  
(Mexico)

DEFENDANT

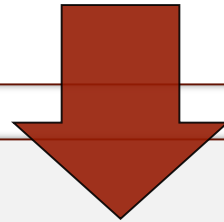
Chevalier, Inc.

Incorporated  
(France)

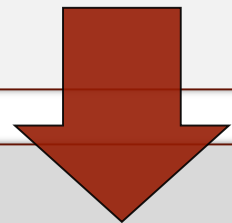
PPB  
(California)

# *Diversity Jurisdiction?*

**Two foreign pilots flying for Eithad Airways get in fight in Westin Hotel in Chicago**



**One pilot sues other along with Westin Hotel in N.D. Ill.**



**Question: Motion to dismiss action for lack of complete diversity?**

# GRANT

- ***Baylay v. Etihad Airways* (7<sup>th</sup> Cir. 2018) 881 F.3d 1032**
- **No diversity in action between foreign citizens and U.S. citizen as an additional party**

# Corporations

**All States  
of Incorp.**



**Principal  
Place of  
Business**



**Corp.'s  
Citizenship**

# Diversity Jurisdiction?

## Plaintiff

Torrey Harrison (Maine)

State Wrongful  
Termination Claim  
for Maine  
employment at  
group home

## Defendant

### Granite Bay Care, Inc.


- **Maine** – all group homes and clients; administrative offices and day-to-day operations
- **New Hampshire** – where company is incorporated and has its headquarters, and where the two owners direct overall strategy

# Holding – Diversity Exists

- ***Harrison v. Granite Bay Care, Inc.* (1<sup>st</sup> Cir. 2016) 811 F.3d 36**
- Diversity Jurisdiction is proper under “nerve center” test where corporation is directed, controlled and coordinated

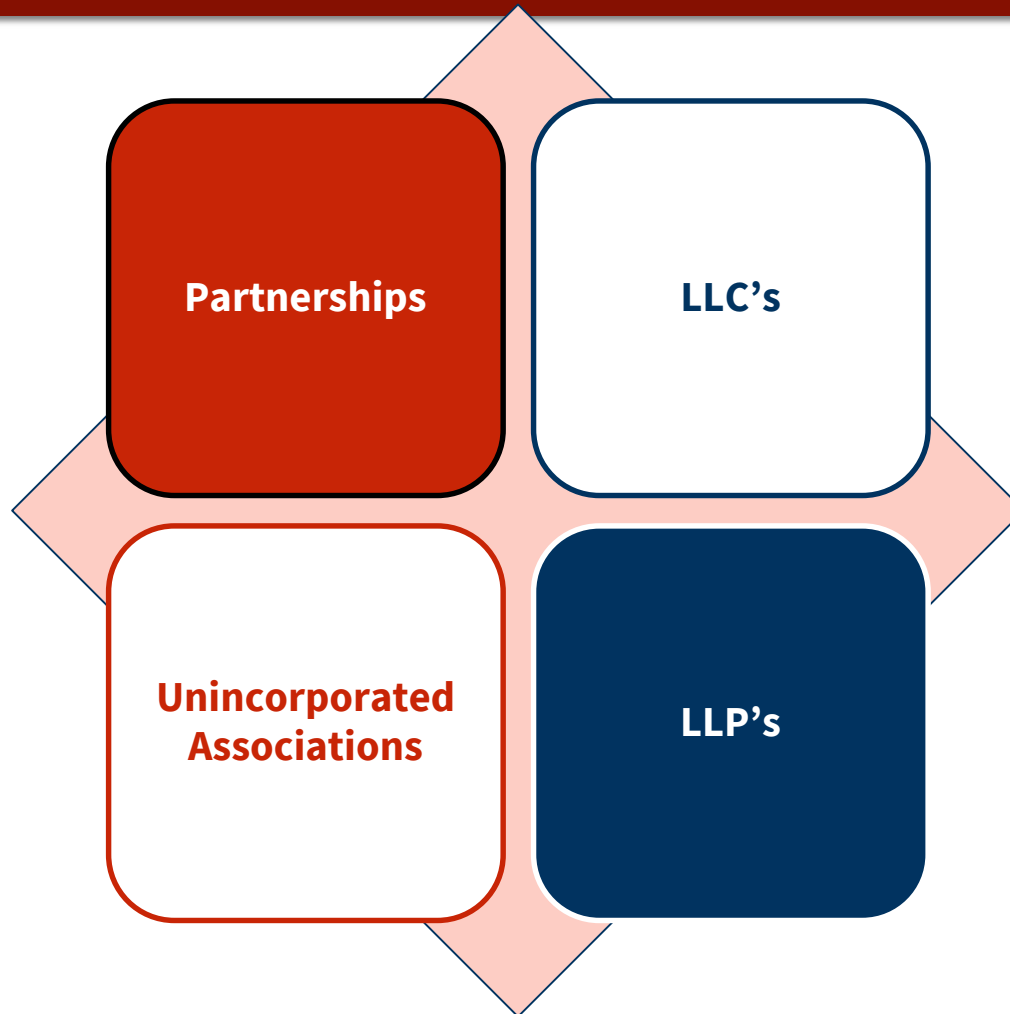
*See also Hertz Corp. v. Friend* (2010) 559 U.S. 77 – PPB not where majority of business done; *Bearbones, Inc. v. Peerless Indem. Ins.* (1<sup>st</sup> Cir. 2020) 936 F.3d 12— party invoking diversity has burden to demonstrate corporate party’s principal place of business; *Condado 3 CFL, LLC v. Centro de Desarrollo* (D. P.R. 2020) 2020 U.S. Dist. LEXIS 23118 (Delgado-Colon, J.)—plaintiff fails to meet burden of showing corporation’s diverse citizenship; *Triangle Cayman Asset Co. v. Empresas Omajede, Inc.* (D. P.R. 2019) 2019 U.S. Dist. LEXIS 58468 (Perez-Gimenez, J.) – diversity shown based on sworn discovery that arguably “dummy” company not citizen of Puerto Rico

# **Non-Corporate Entities**



**Citizenship  
Of All Members**

# All Non-Corporate Entities



*Pramco, LLC v. San Juan Bay Marina, Inc.* (1<sup>st</sup> Cir. 2006) 435 F.3d 51

# Diversity Drilling

$\pi$

**Lambert  
(VA)**

$\Delta$

**D – You Light  
'Em LLC**

**Besosa LLP  
(P.R.)**

**Wagstaffe  
(CA)**

**George  
Besosa (VA)**

**Mary Besosa  
(P.R.)**

# Cf. Trust's Citizenship

## Business Trust

**"Trust" entities  
created by statute**

**Citizenship of  
All Members –  
SH's**

***Americold Realty  
Trust v. ConAgra  
Foods, Inc. (2016)  
136 S.Ct. 1012***

## Traditional Trust

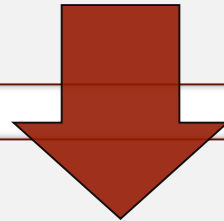
**Traditional fiduciary  
established by private  
trust document**

**Citizenship of  
Trustee**

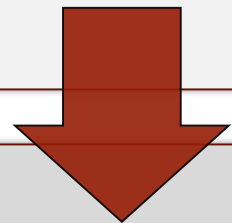
***Demarest v. HSBC Bank  
(9<sup>th</sup> Cir. 2019) 920 F.3d  
1223***

# *Amount in Controversy?*

P alleges D seized automobile without proper basis and alleges \$1 million in damages, including emotional distress



Only plausible claim based on loss of use of car for 13 months until it was returned



**Question: How Should Court Rule on Motion to dismiss action?**

# GRANT

- ***Equilin-Mendoza v. Don King Productions* (1<sup>st</sup> Cir. 2011) 638 F.3d 1**
  - Despite good faith prayer, legal certainty test not satisfied
  - Since lost value (cost of rental car in interim) + \$22,000, amount in controversy absent
- See also *Bronner v. Duggan* (D.C. Cir. 2020) 962 F.3d 956—professor's claim for less than requisite amount since no right to sue derivatively for academic association

# Miner's Tips

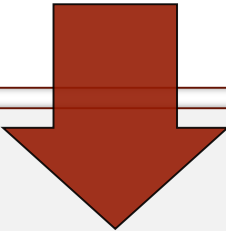
- **Assess citizenship of all parties**
- **Drill down down “factor tree”**
- **“Show me the money”**

# Golden Nugget #5: Removal to Federal Court?

*Burrell v. Bayer Corp.*  
(4<sup>th</sup> Cir. 2019) 918  
F.3d 372

# *Federal Question Removal?*

**Suit against Bayer for damages  
from female sterilization device**



Removed as “substantial federal  
question” since device regulated by  
FDA subject to federal Medical  
Device Act (21 U.S.C. § 360(c))



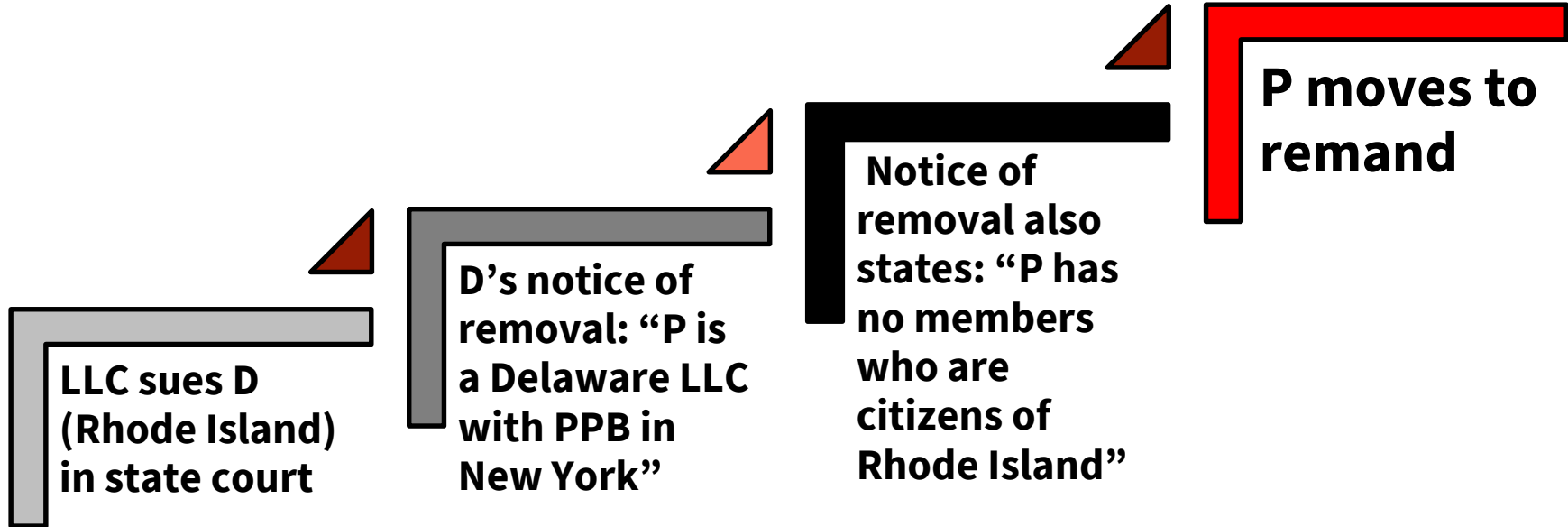
**Motion to remand for lack of  
jurisdiction?**

# Grant

- ***Burrell v. Bayer Corp.* (4<sup>th</sup> Cir. 2019) 918 F.3d 372**
- **No private right of action under federal statute and preemption only defensive**
- **No *Grable* “substantial federal question”**

*See also Miller v. Bruenger* (6<sup>th</sup> Cir. 2020) 949 F.3d 986--dispute over benefits under life insurance policy issued to federal worker and governed by Federal Employees' Group Life Insurance Act does not raise a substantial federal question; *Estate of Cornell v. Bayview Loan Servicing LLC* (6<sup>th</sup> Cir. 2018) 908 F.3d 1008—no federal claim arising under jurisdiction in challenge to state foreclosure under Federal Garn-St. Germain Act (12 U.S.C. § 1701j(3))

# Remand for lack of jurisdiction?



# Grant

## ***D.B. Zwirn Special Opportunities Fund v. Mehrota* (1<sup>st</sup> Cir. 2011) 661 F.3d 124**

- Yes, if, in fact, no diversity jurisdiction
- Burden on party invoking federal jurisdiction to allege and prove complete diversity

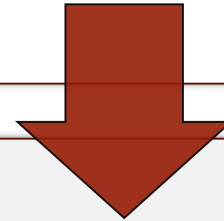
*See also Platinum-Montaur Life Scis., LLC v. Navidea Biopharmaceuticals, Inc.* (2d Cir. 2019) 943 F.3d 613—party invoking diversity jurisdiction (defendant on removal) has burden of establishing citizenship of all members of non-corporate artificial entities; *Reverse Mortgage Funding, LLC v. Estate of Antonini-Nazario* (D. P.R. 2020) 2020 U.S. Dist. LEXIS 30453 (Delgado-Colon, J.)—same.

# It's Not All Local

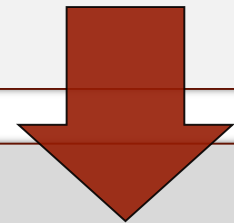
*Encompass Insur. Co.  
v. Stone Mansion  
Rest. (3d Cir. 2018)  
902 F.3d 147*

# Removal – Local Defendant?

**Insurer (IL.) pays liability claim and sues  
Restaurant (Pa.) under dram shop law in  
Allegheny County, Pa.**



**Restaurant removes to federal court  
BEFORE it is formally served**



**Motion to remand under local  
defendant bar?**

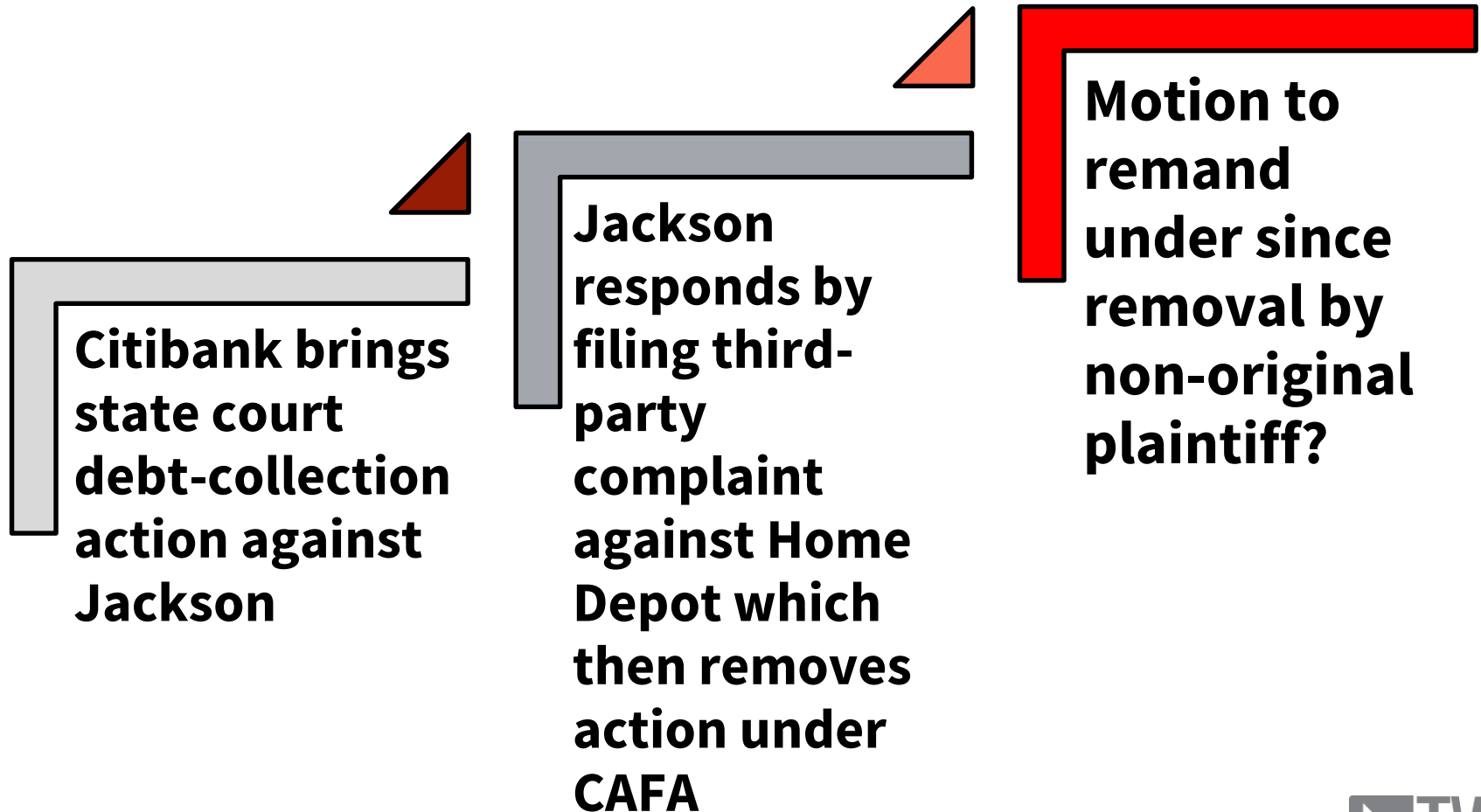
# Deny

## ***Encompass Insurance Co. v. Stone Mansion Restaurant (3d Cir. 2018) 902 F.3d 147***

- **Statutory bar (28 U.S.C. §1441(b)(2)) applies only if local defendant is properly joined and served**

*See also Gibbons v. Bristol-Myers Squibb Co. (2d Cir. 2019) 919 F.3d 699; Contra Gentile v. Biogen Idec, Inc. (D. Mass. 2013) 934 F.Supp.2d 313; see TWG §8-V[C]*

# Removal – Non-Original Plaintiffs?



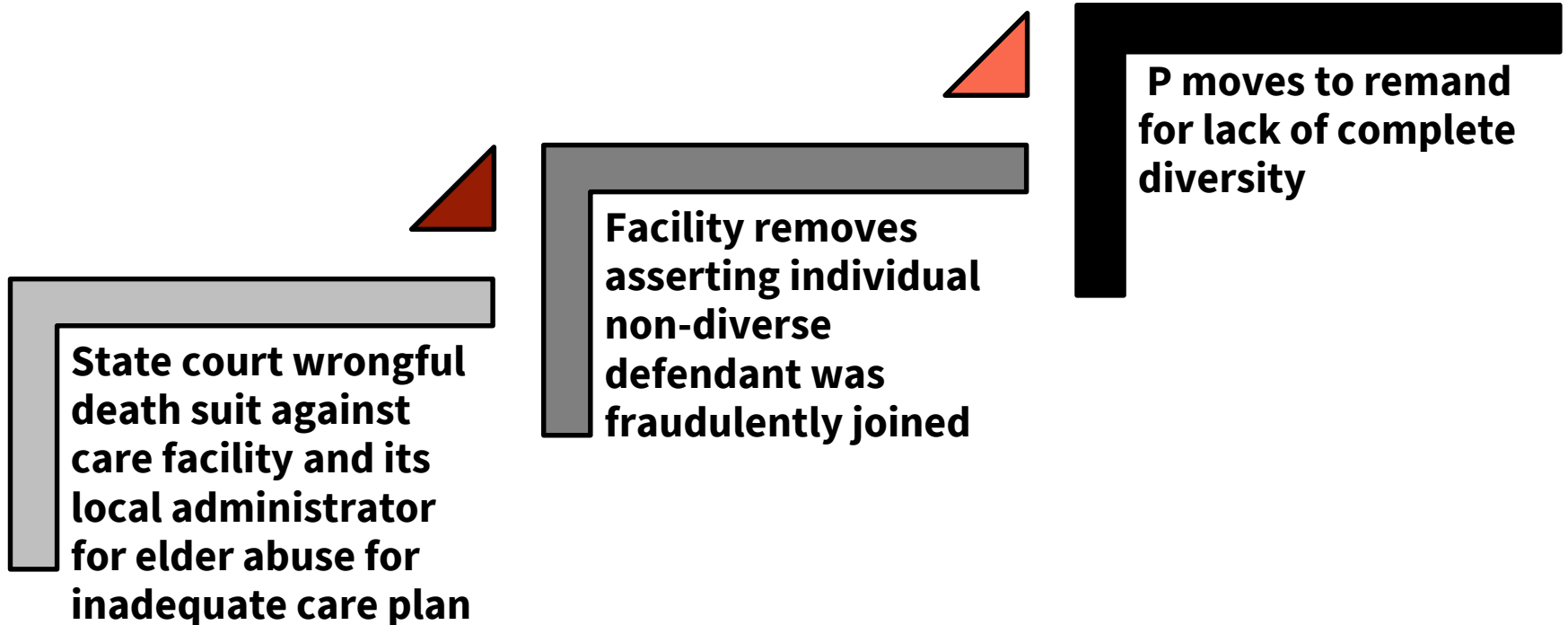
# Remand

## ***Home Depot U.S.A., Inc. v. Jackson* (2019) 139 S.Ct. 1743**

- **Removal even under CAFA limited to original plaintiffs and therefore no such right even if federal jurisdiction otherwise exists over third-party complaint or counterclaim**

*See also Renegade Swish, L.L.C. v. Wright* (5<sup>th</sup> Cir. 2017) 857 F.3d 692—no removal based on federal counterclaim; *Bowling v. U.S. Bank Nat'l Ass'n* (11<sup>th</sup> Cir. 2020) 963 F.3d 1030--third party defendant cannot remove; *Romulus v. CVS Pharmacy, Inc.* (1<sup>st</sup> Cir. 2014) 770 F.3d 67, 74—removal based on information in plaintiff's email; see TWG §8-V[C].

# Sham Joinder Rule: Remand?



# GRANT

*Grancare, LLC v. Thrower, By and Through Mills*  
(9<sup>th</sup> Cir. 2018) 889 F.3d 543

- Defendant not “sham” if there is a possible basis for recovery (not a Rule 12(b)(6) test)
- Administrator could be personally liable (i.e., colorable claim for failure to provide due care)

*See Universal Truck & Equip. Co. v. Southworth-Milton, Inc.* (1<sup>st</sup> Cir. 2014) 765 F.3d 103—no reasonably possible liability of agent for disclosed principal; *Sea World, LLC v. Seafarers, Inc.* (D. P.R. 2016) 191 F.Supp.3d 167—same (Perez-Gimenez, J.)

# *CAFA Removal*

*28 U.S.C. § 1453*

Minimal  
Diversity

\$5 million  
Aggregate

No Joinder  
Requirement

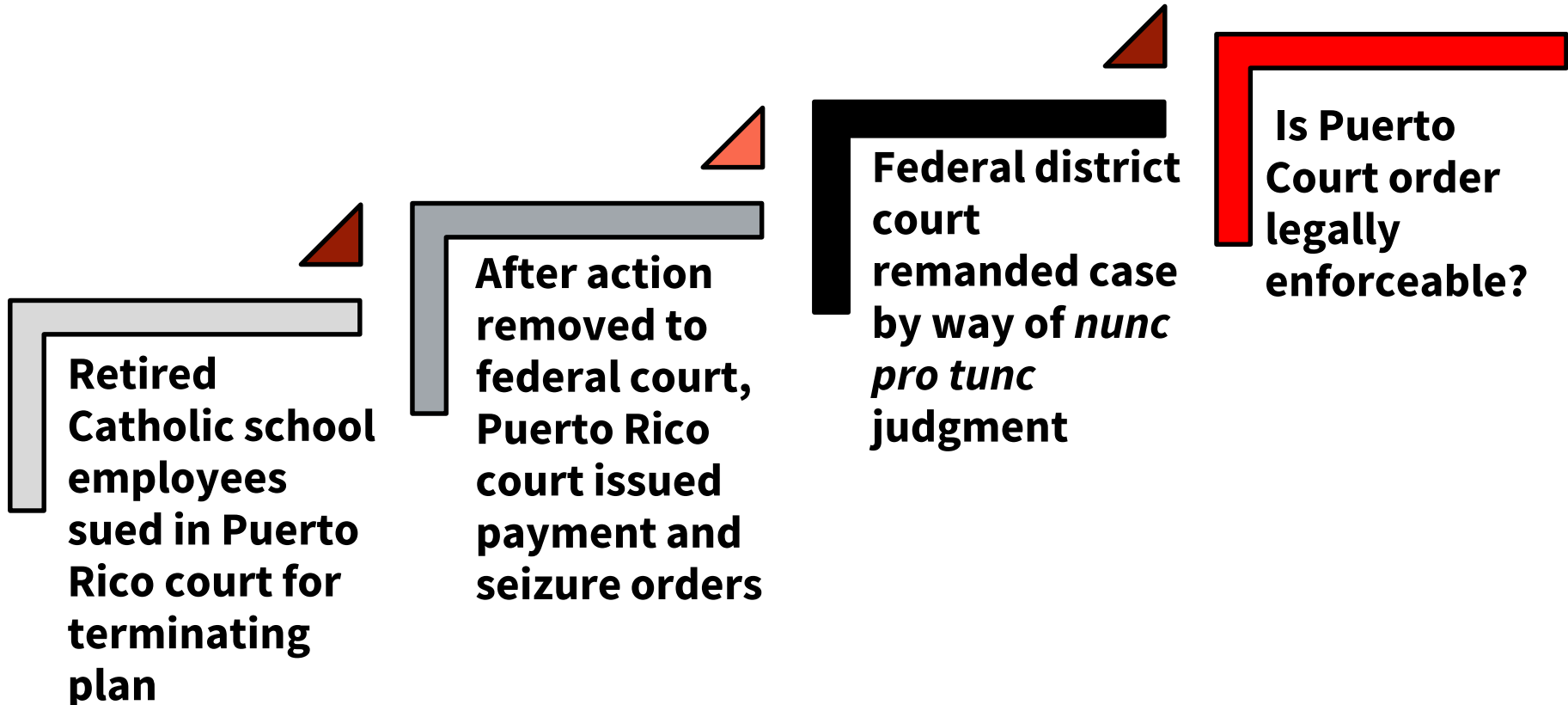
No One-Year  
Time Limit

Abstention  
Rules

# CAFA

- Must show reasonable probability amount in controversy could exceed \$5 million. *Pazol v. Tough Mudder, Inc.* (1<sup>st</sup> Cir. 2016) 819 F.3d 548
- Thirty-day clock to remove CAFA case triggered only when complaint (or subsequent paper) provides D with sufficient information easily to determine matter is removable. *Romulus v. CVS Pharmacy, Inc.* (1<sup>st</sup> Cir. 2014)
- Removing defendant's allegations of citizenship in CAFA case on information and belief satisfactory unless factually challenged. *Ehrman v. Cox Communications, Inc.* (9<sup>th</sup> Cir. 2019) 932 F.3d 1223

# State Court Jurisdiction After Removal?



# No

***Roman Catholic Archdiocese v. Acevedo-Feliciano*  
140 S.Ct. 696 (2020)**

**Once a notice of removal is filed, state court shall proceed no further unless and until case is remanded (28 U.S.C. sec. 1446(d))**

**“Nunc pro tun orders are not some Orwellian vehicle for revisionist history—creating ‘facts’ that never occurred in fact”**

# Removal Procedure



Notice of Removal (pleading federal jurisdiction) (1446(a))

Removed in timely fashion (ordinarily within 30 days of service) (1446(b)(1))

Filed in federal district embracing state court where filed (1441(a))

Joinder of all served defendants (1446(b)(2))

Served on opposing parties and filed in state court (1446(d))

# Removal Timing

Within 30 days of proper service of removable complaint (1446(b)(1))

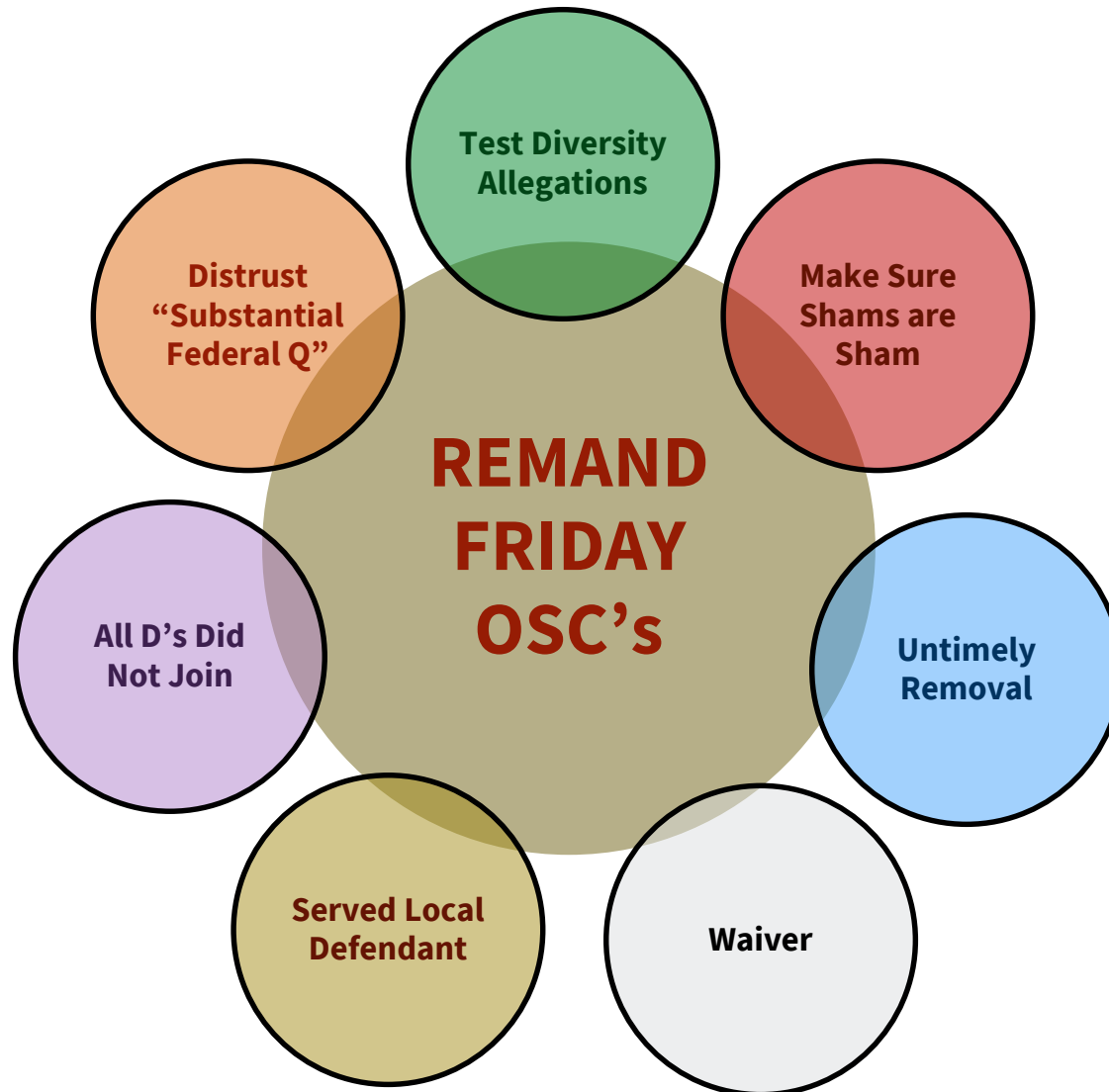
30 days from later service on any other defendant (with joinder of served defendants) (1446(b)(2)(B)(C))

If case in initial pleading not removable, within 30 days of receipt of paper first showing it is or has become removable (1446(b)(3), (c)(3)(A))

If removal of changed or now ascertainable case on diversity grounds, removal not later than 1 year after commencement (1446(c)(1), (c)(3)(B))

Motion to Remand? (30 days if procedural defect, anytime if lack of jurisdiction) (1447(c))

# Miner's Tips

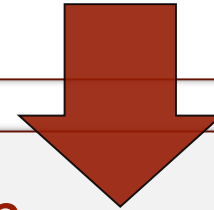


# Golden Nugget #6: Decline Supplemental Jx

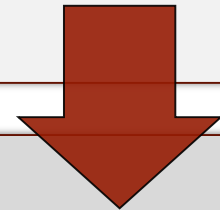
*Robinson v. Town of  
Marshfield* (1<sup>st</sup> Cir. 2020)  
950 F.3d 21

# Supplemental Jurisdiction?

**Fire Chief sues town under ADEA and state law claims for defamation and retaliation based on retaliation for reporting gender discrimination**



**Court granted summary judgment for town based on unrebutted evidence termination was for morale and performance reasons**



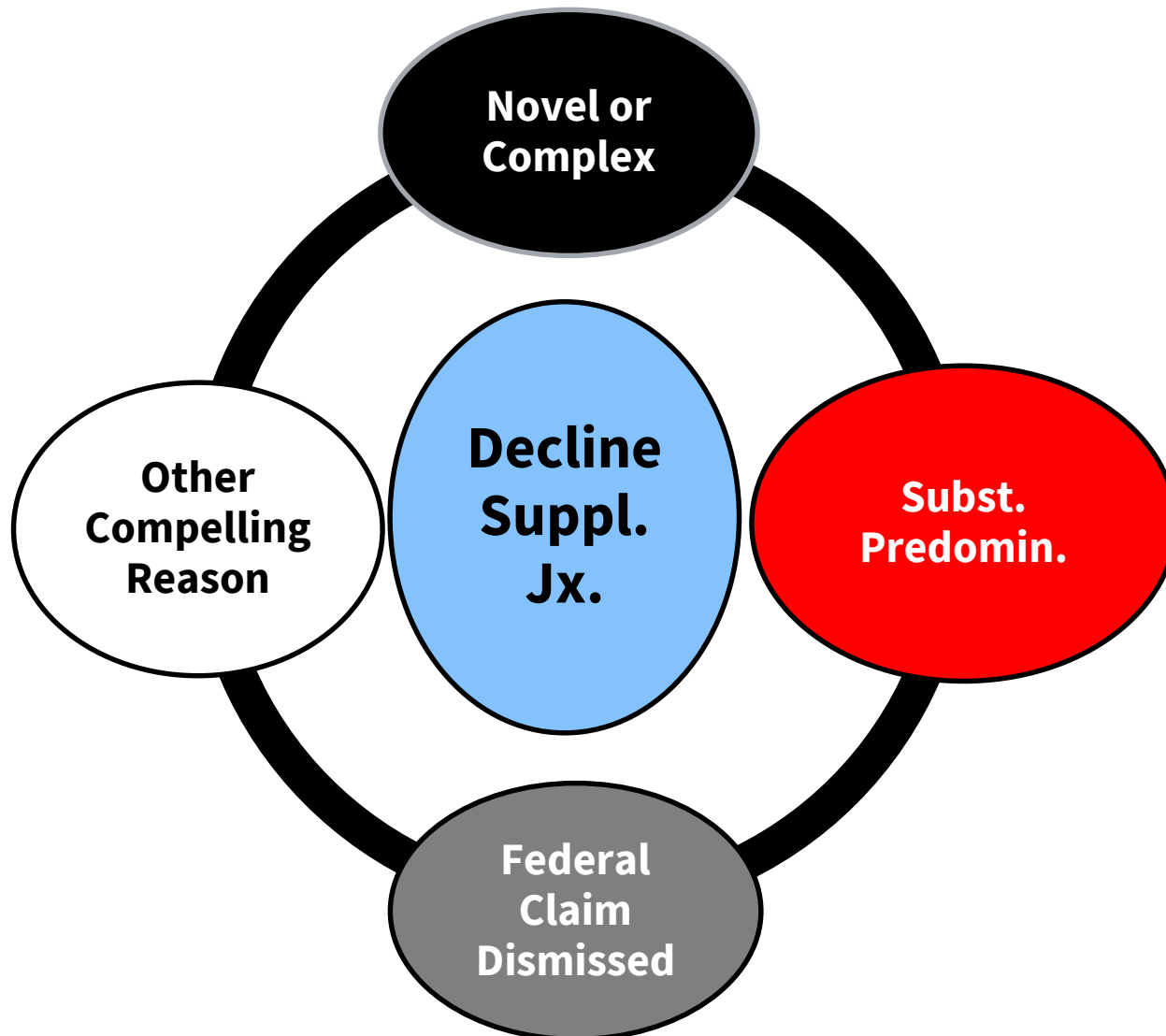
**Question: Retain supplemental jurisdiction over state law claims?**

# Decline

- ***Robinson v. Town of Marshfield* (1<sup>st</sup> Cir. 2020) 950 F.3d 21**
- **After court grants SJ on federal claims, it should decline supplemental jurisdiction when disputed facts on state claim**

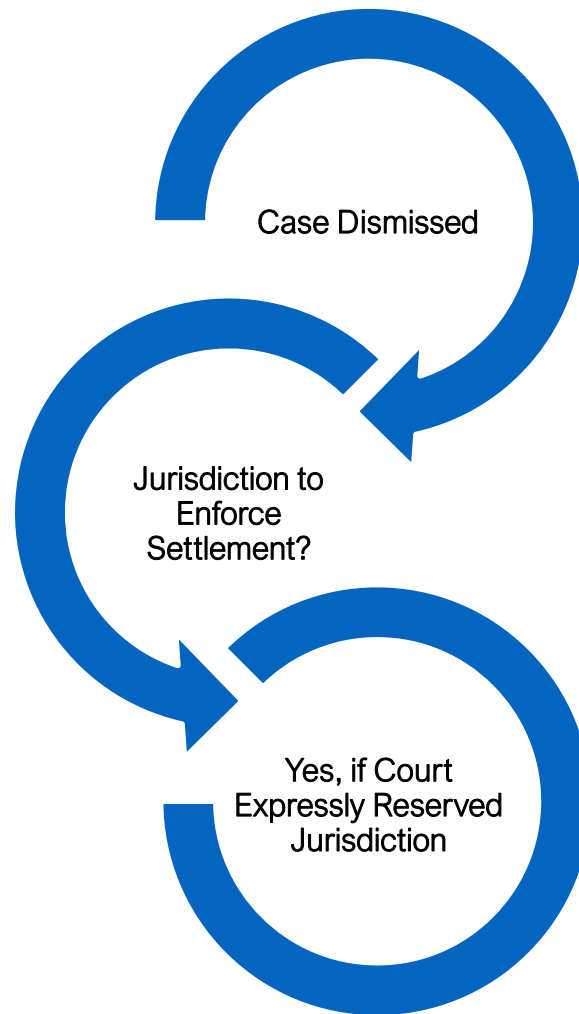
See *Sexual Minorities Uganda v. Lively* (1<sup>st</sup> Cir. 2018) 899 F.3d 24--broad discretion to dismiss; *Wborras-Borrero v. Corporacion Del Fondo* (1st Cir. 2020) 958 F.3d 26—if federal claim dismissed at early stage, court “should decline” supplemental jurisdiction; *Sexual Minorities Uganda v. Lively* (1<sup>st</sup> Cir. 2018) 899 F.3d 24—same; *Cohen v. Postal Holdings* (2d Cir. 2017) 873 F.3d 394—if anchor claim dismissed for no jurisdiction, no supplemental jurisdiction

# 28 U.S.C. Sec. 1367(c)



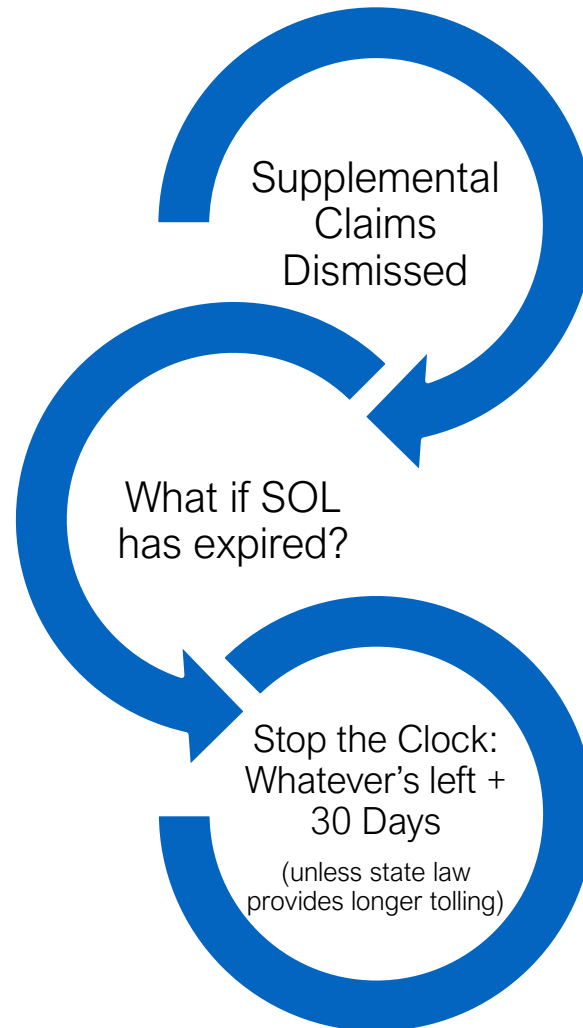
# *Jurisdiction Post-Dismissal*

*Kokkonen v. Guardian Life Ins. Co.* (1994) 511 U.S. 375



# SOL

*28 U.S.C. 1367(d), Artis v. Dist. of Columbia (2018) 138 S.Ct. 594*



# Miner's Tips

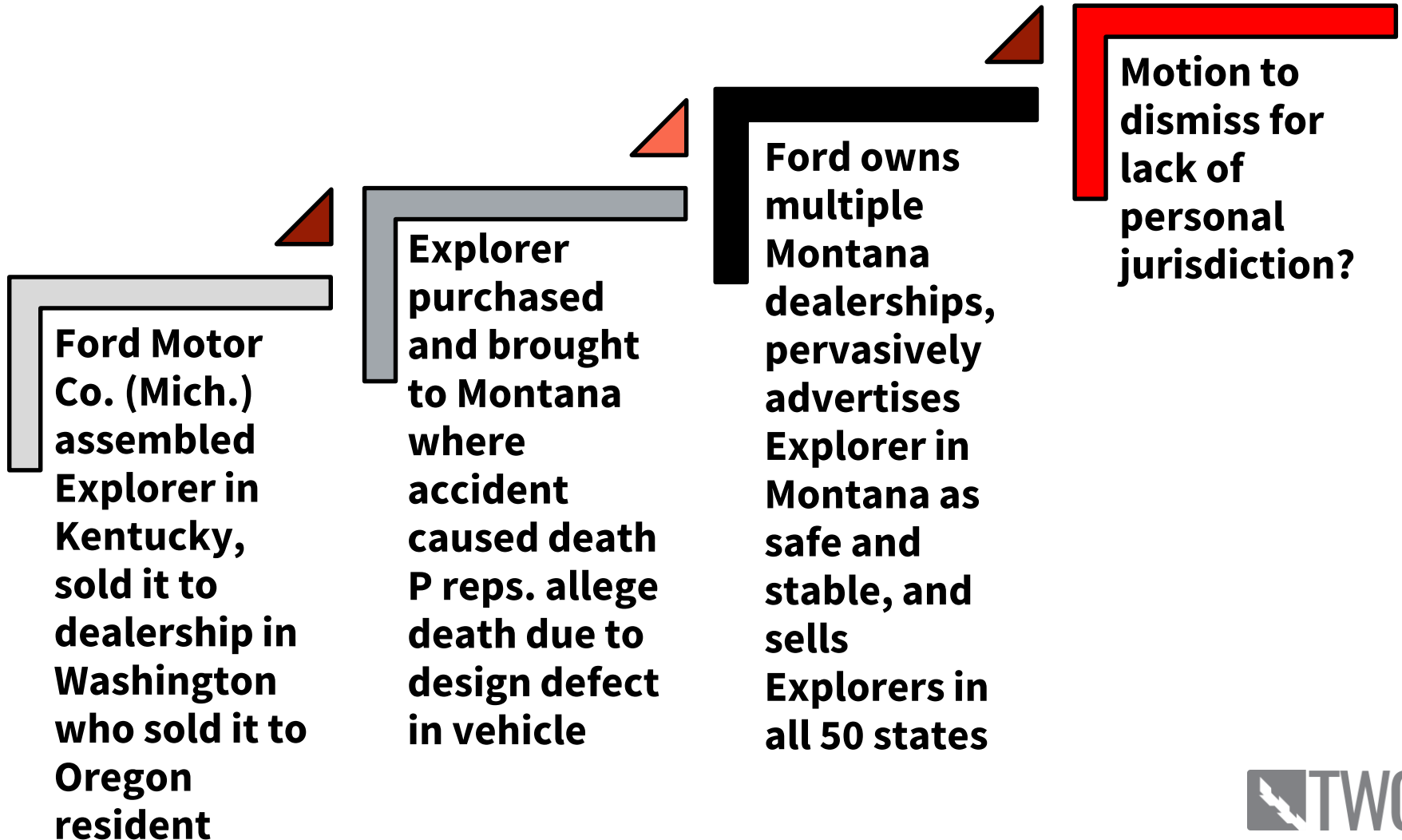
- **Test same transaction conclusions**
- **Wear state judicial hat only when it fits**

# Golden Nugget #7:

## Personal Jurisdiction

- ***Ford Motor Co. v. Montana 8<sup>th</sup> Judicial Dis., cert. granted, No. 19-368***

# Personal Jurisdiction Exploring



# Grant?

## ***Ford Motor Co. v. Montana 8<sup>th</sup> Judicial Dis., cert. granted, No. 19-368***

- **Issue: Specific jurisdiction? i.e., whether Ford’s substantial Montana activities caused the injury in question, or whether delivering the Explorer into the “stream of commerce” and into a state in which the defendant does substantial business suffices for personal jurisdiction**

See *Prep Tours, Inc. v. AYSO* (1st Cir. 2019) 913 F.3d 11—no jurisdiction over culpa in contrahendo suit; *Plixer Int’l v. Scrutinizer GmbH* (1<sup>st</sup> Cir. 2018) 905 F.3d 1—jurisdiction over D with \$200,000 business in forum; *Knox v. MetalForming, Inc.* 914 F.3d 685 (1<sup>st</sup> Cir. 2019)—jurisdiction upheld; *LP Solutions LLC v. Duchosois* (1<sup>st</sup> Cir. 2018) 907 F.3d 95, 102—merely sending contract payments on occasion to forum not sufficient for purposeful availment

# International Shoe & Modern Formulation

- Due Process Requires Defendant have certain minimum contacts with forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice

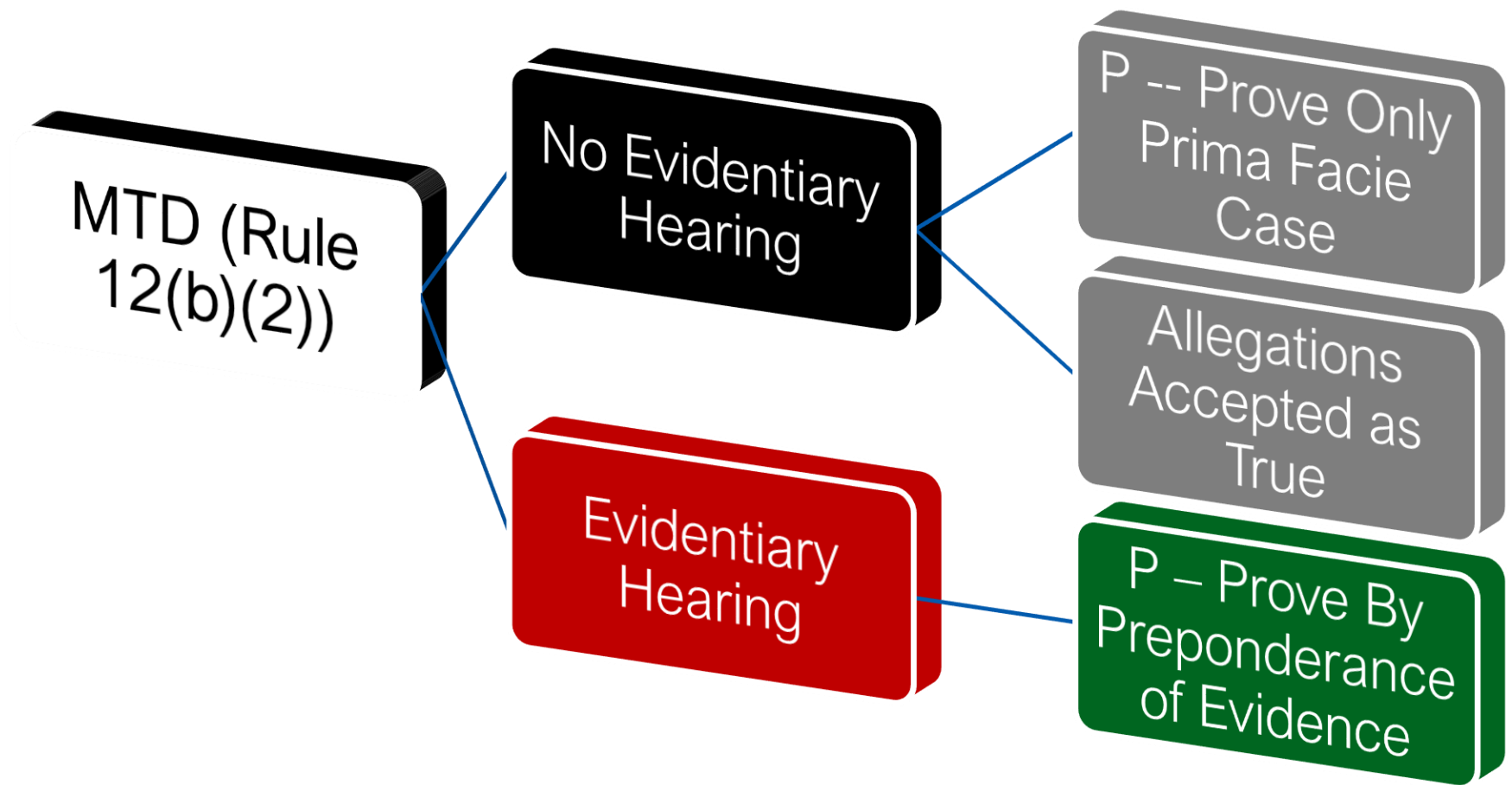
# Don't Count the $\pi$

## ***Walden v. Fiore* (2014) 134 S.Ct. 1115**

DEA agent in Georgia airport allegedly intentionally and illegally seized money of plaintiff from Nevada. Holding: No jurisdiction in Nevada since pertinent question is whether the defendant has links to the forum, not whether the plaintiff has such links

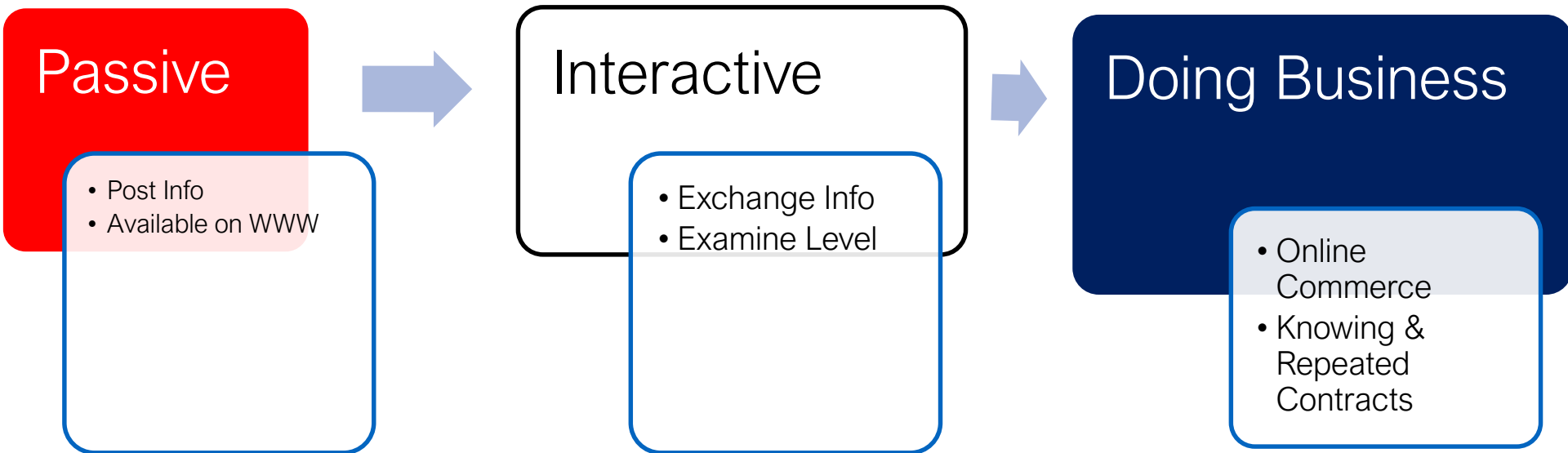
## **Bristol-Meyers Squibb v. Sup. Ct. (2017) 137 S.Ct. 1773**

Defective drug claim by hundreds of out-of-state plaintiffs for drugs sold outside California rendered jurisdiction there unreasonable since defendant's marketing and development elsewhere



*Chen v. United States Sports Acad.* (1st Cir. 2020) 956 F.3d 45—if no evidentiary hearing, P need show only a prima facie case; but D's facts by affidavit must be controverted

# ZIPPO SLIDING SCALE SPECTRUM



*See Chen v. US Sports Academy, Inc.* (1<sup>st</sup> Cir. 2020) 956 F.3d 45—  
informational website of online educational institution in Alabama  
insufficient for jurisdiction as to student in Massachusetts

# Miner's Tips

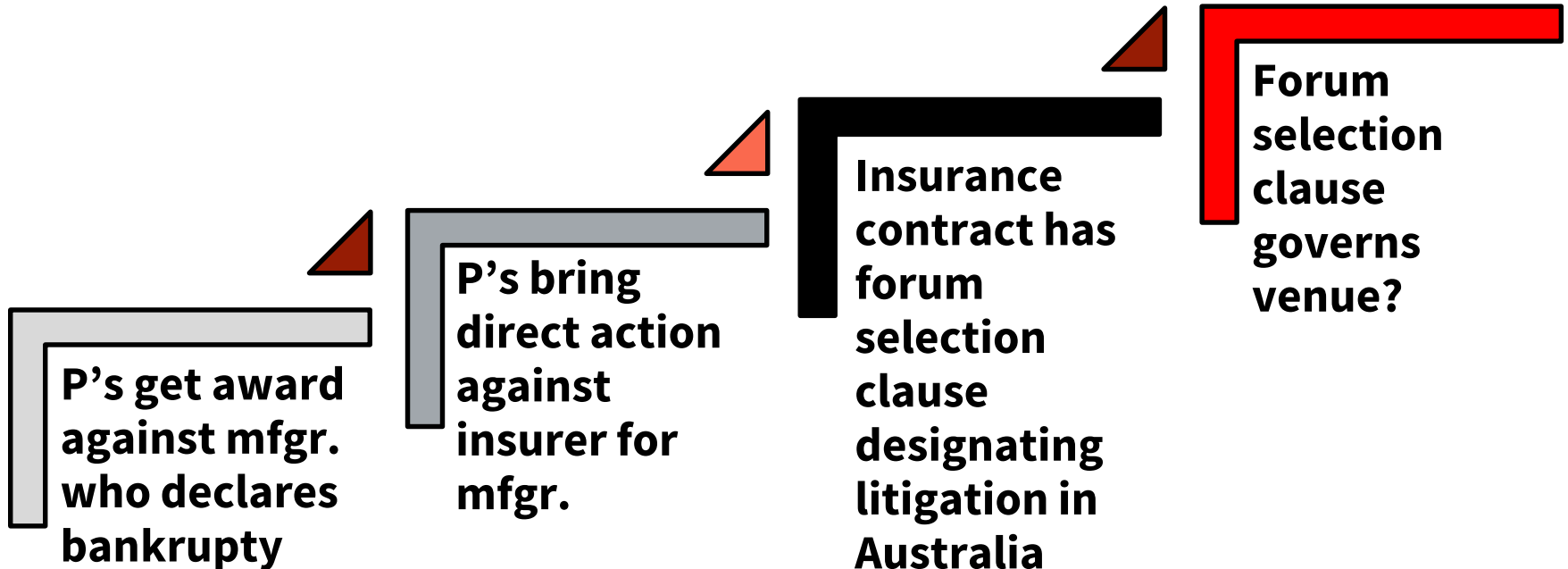
- **Count the contacts as “rocks on a pile”**
- **Look solely at D's forum-based contacts**

# Golden Nugget #8

## Choosing a Mine

***Lewis v. Liberty Mutual  
Ins. Co. (9<sup>th</sup> Cir. 2020)***  
**953 F.3d 1160**

# Forum Selection Clause Exploring



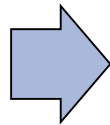
# Yes

- ***Lewis v. Liberty Mutual Ins. Co.* (9<sup>th</sup> Cir. 2020) 953 F.3d 1160**
- **Forum clause applies to party suing derivatively through contract**

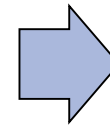
See *Blue Ocean Int'l Bank v. Golden Eagle Capital* (D. P.R. 2019) 408 F.Supp.3d 57 (Besosa, J.)—forum selection clause presumptively enforceable; *In re: McGraw-Hill Global Education Holdings LLC* (3d Cir. 2018) 909 F.3d 48—non-signatory not bound if not “closely related” *City of Albany v. CH2M Hill, Inc.* (9<sup>th</sup> Cir. 2019) 924 F.3d 1306—forum clause exclusively selecting *state court* in state county precludes removal; *Autoridad de Energia v. Vitol, S.A.* (1<sup>st</sup> Cir. 2017) 859 F.3d 140—removal waived if co-defendant’s forum selection clause vests exclusive jurisdiction in “courts of Commonwealth of Puerto Rico”

# Atlantic Marine Case

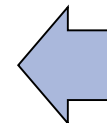
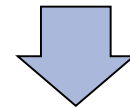
*Atlantic Marine Constr. Co. v. U.S. Dist. Ct. (2013) 134 S.Ct. 568*



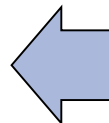
**Atlantic Marine  
Constr. Co. (VA)**



**Contracts with  
Army Corps of  
Engineers**



**Subcontracts  
with J-Crew  
Management (TX)**



**Ford Hood, Texas**

**Circuit  
Court  
City of  
Norfolk,  
Virginia**

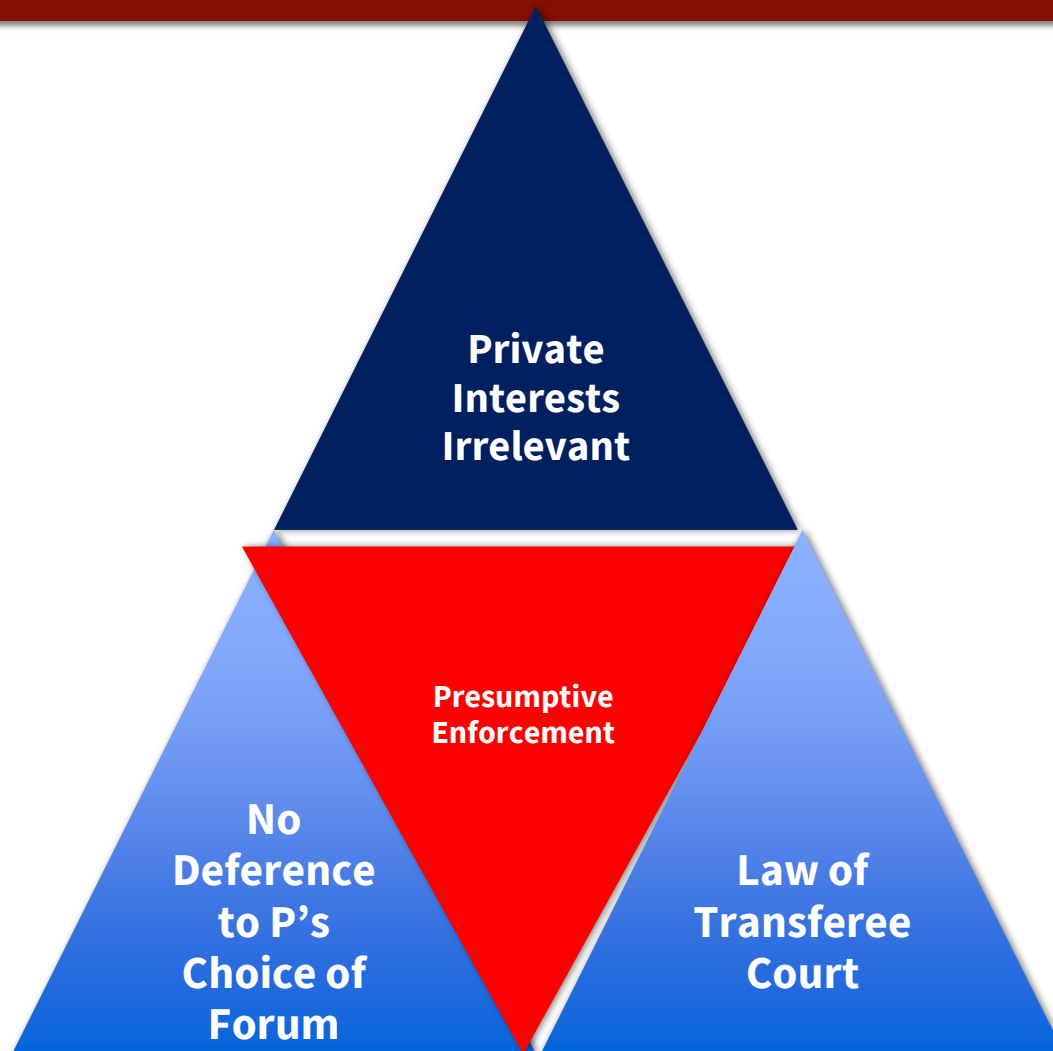
**OR**

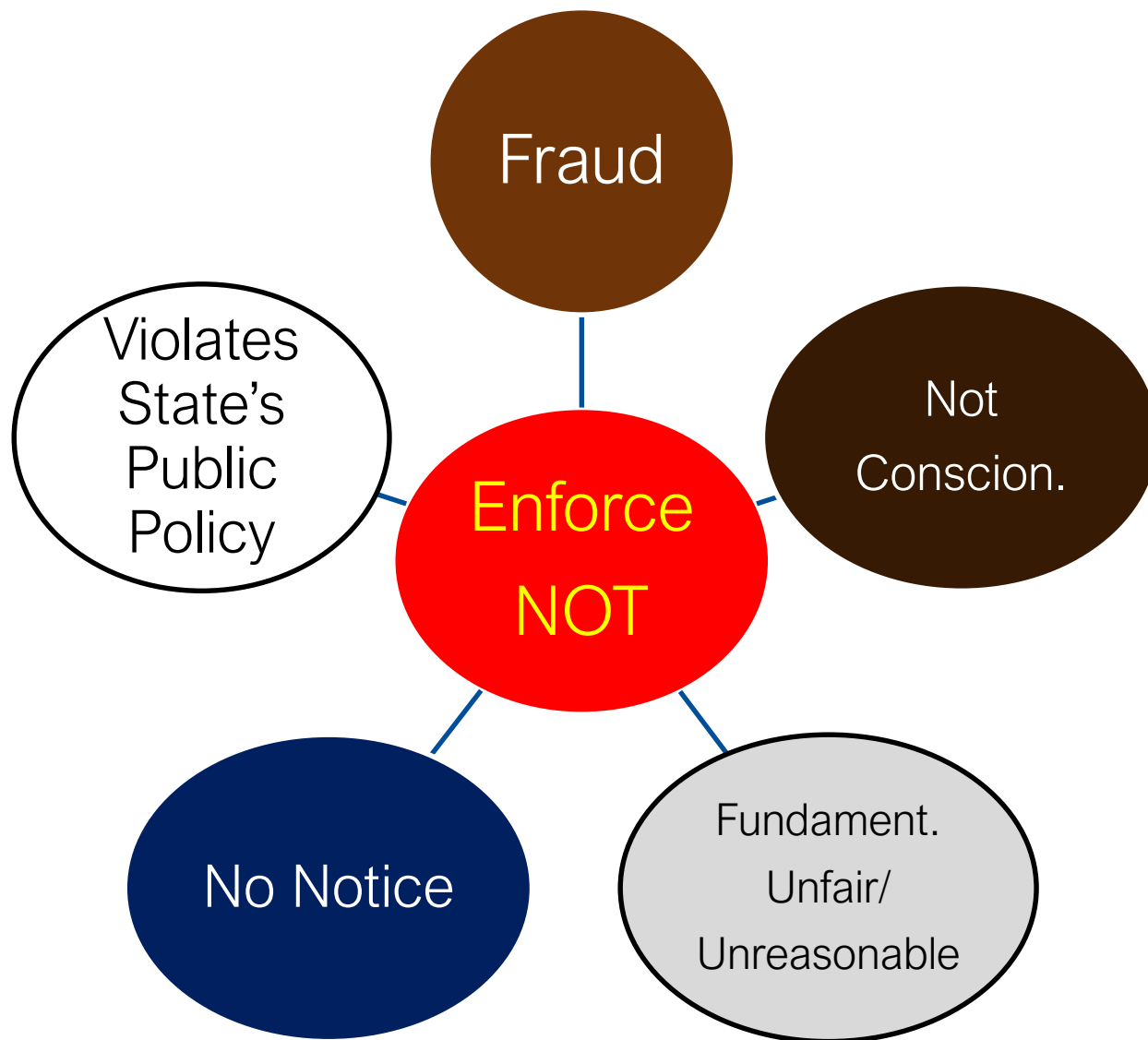
**U.S. Dist.  
Court  
E.D. Va.**



**Mandatory  
Forum  
Selection for  
All Disputes  
Between  
Parties**

# Impact of Atlantic Marine





See *Colon v. Sanchez* (D. P.R. 2019) 2019 U.S. Dist. LEXIS 35965 (McGiverin, M.J.)—forum selection clause in medical informed consent form unenforceable per Regulation 7617; *Rafael Rodriguez Barril, Inc. v. Conbraco Indus., Inc.* (1<sup>st</sup> Cir. 2010) 619 F.3d 90—lists ground for rendering forum selection clause unenforceable

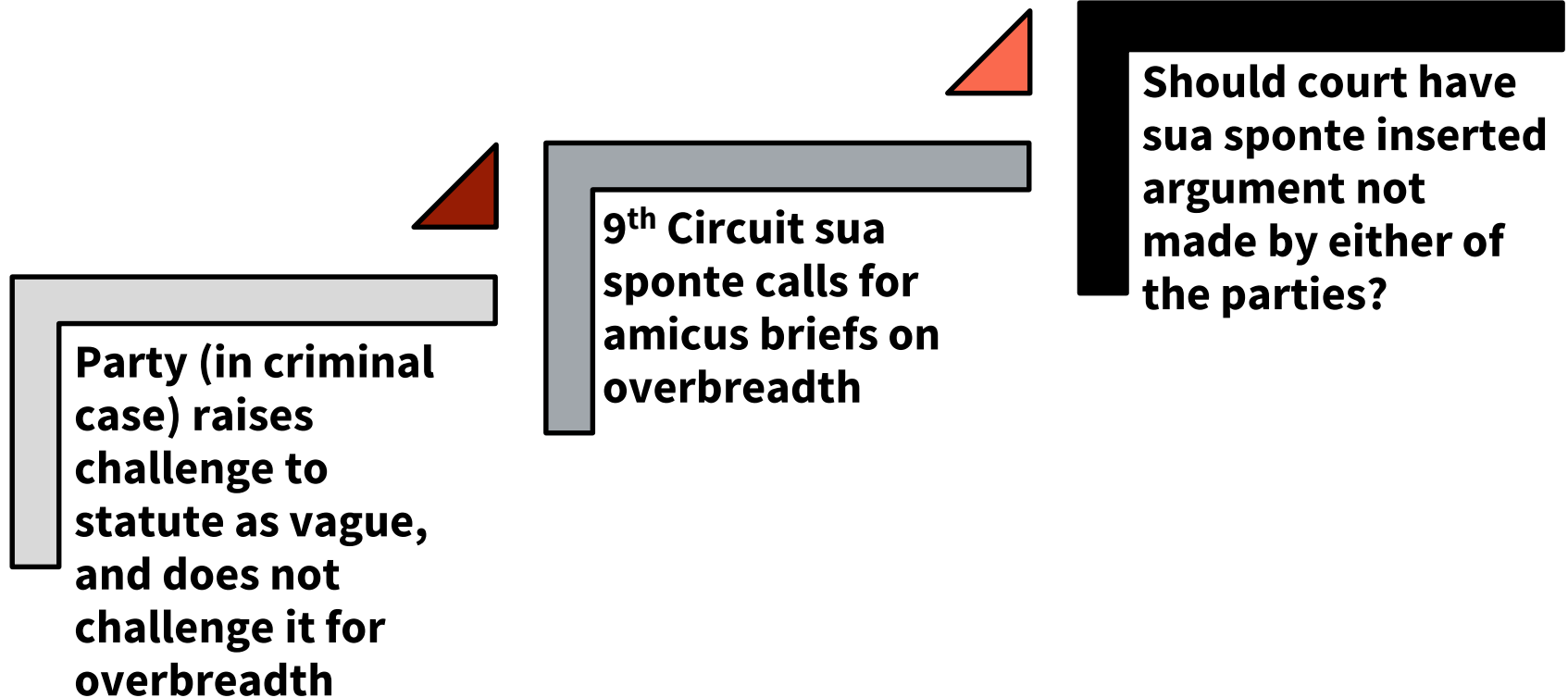
# Miner's Tips

- **Always, always read the forum selection clause**
- **Remember, such clauses are presumptively enforceable (and trump private interests)**
- **Forum clause can preclude (or require) federal court venue**

# Judicial Sua Sponte?

***United States v.  
Sineneng (2020) 140  
S.Ct. 1575***

# Expect Sua Sponte Help?



# NO

***United States v. Sineneng* (2020) 140 S.Ct. 1575 --  
court “takeover” reversed**

**‘In both civil and criminal cases we rely on the parties to frame the issues for decision and assign to the courts the role of neutral arbitrator of matters the parties present.’**

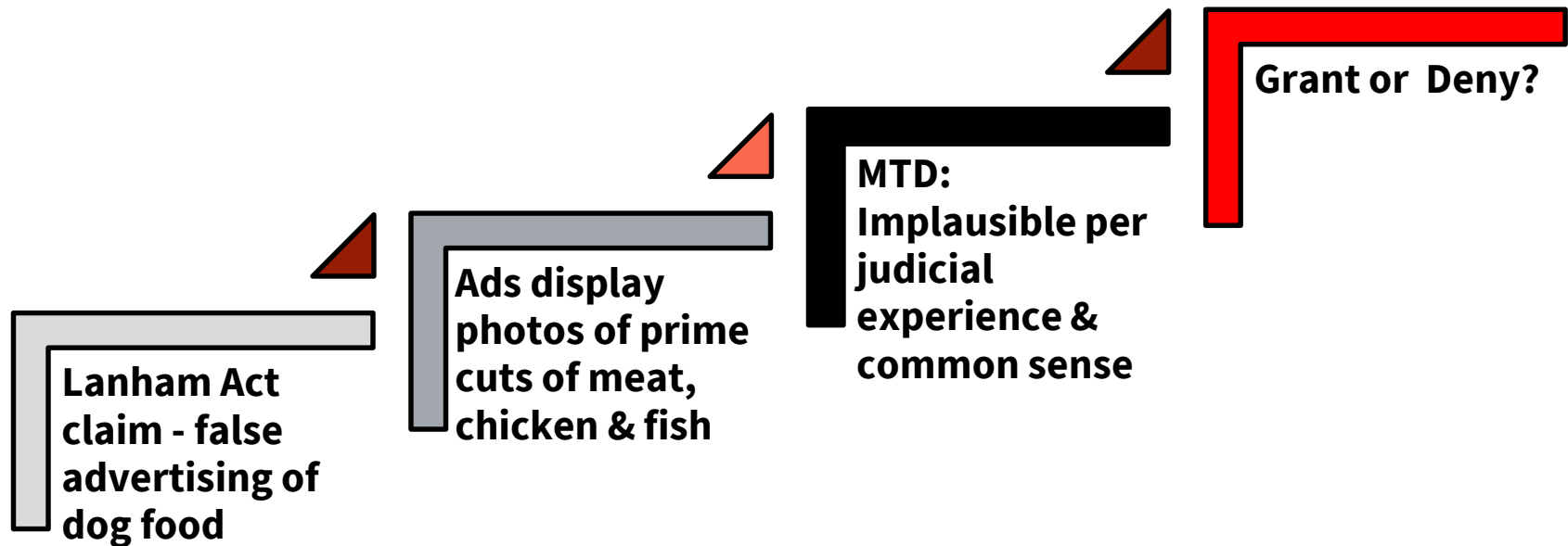
**Court’s “radical transformation of this case goes well beyond the pale.”**

# Golden Nugget #9

## Twiqbal

***Wysong Corp v Apri, Inc.***  
**(6<sup>th</sup> Cir. 2018) 889 F.3d**  
**267**

# Twombly/Iqbal Over the Fence?



# Grant

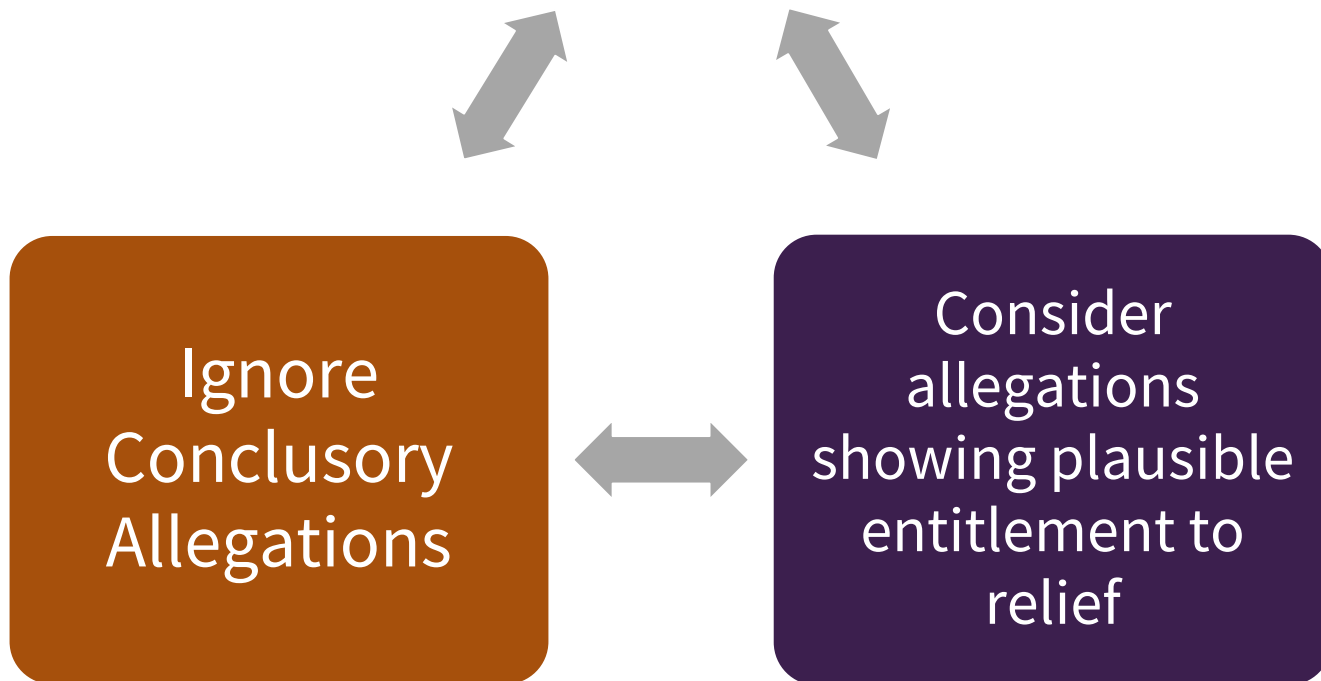
***Wysong Corp v Apri, Inc.* (6<sup>th</sup> Cir. 2018) 889 F.3d 267**

**“The defendant’s product is dog food. Common sense dictates that reasonable consumers are unlikely to expect that dog food is made from the same meat as people eat.”**

See also *Zenon v. Guzman* (1<sup>st</sup> Cir. 2019) 924 F.3d 611—no plausible narrative defeating judicial immunity; *Bertran v. Puerto Rico Aqueduct* (D. P.R. 2019) 2019 U.S. Dist. LEXIS 215126 (Gelpi, J.)—no plausible claim against hospital under Emergency Medical Treatment \* Active Labor Act since care mishandled but no required failure to screen in E.R.

# Twombly/Iqbal: Two-Step

## TI - TWO STEP



# “Hot” New **Twiqbal** Rulings

**Twiqbal applies to affirmative defenses.**

***GEOMC v. Calmare Therapeutics* (2d Cir. 2019) 918 F.3d 92**

**Liability plausible when Wesson Oil advertised as “100% Natural” when it contained genetically modified organisms. *Lee v. Conagra Brands, Inc.* (1<sup>st</sup> Cir. 2020) 958 F.3d 70**

**No plausible liability for ad omitting that worst form of child labor used to make chocolate product. *Tomasella v. Nestle USA* (1<sup>st</sup> Cir. 2020) 962 F.3d 60**

# Miner's Tips

**Conspiracy**

**Bad Faith**

**Alter Ego**

**Qualified  
Immunity**

**Color of Law**

**Malice**

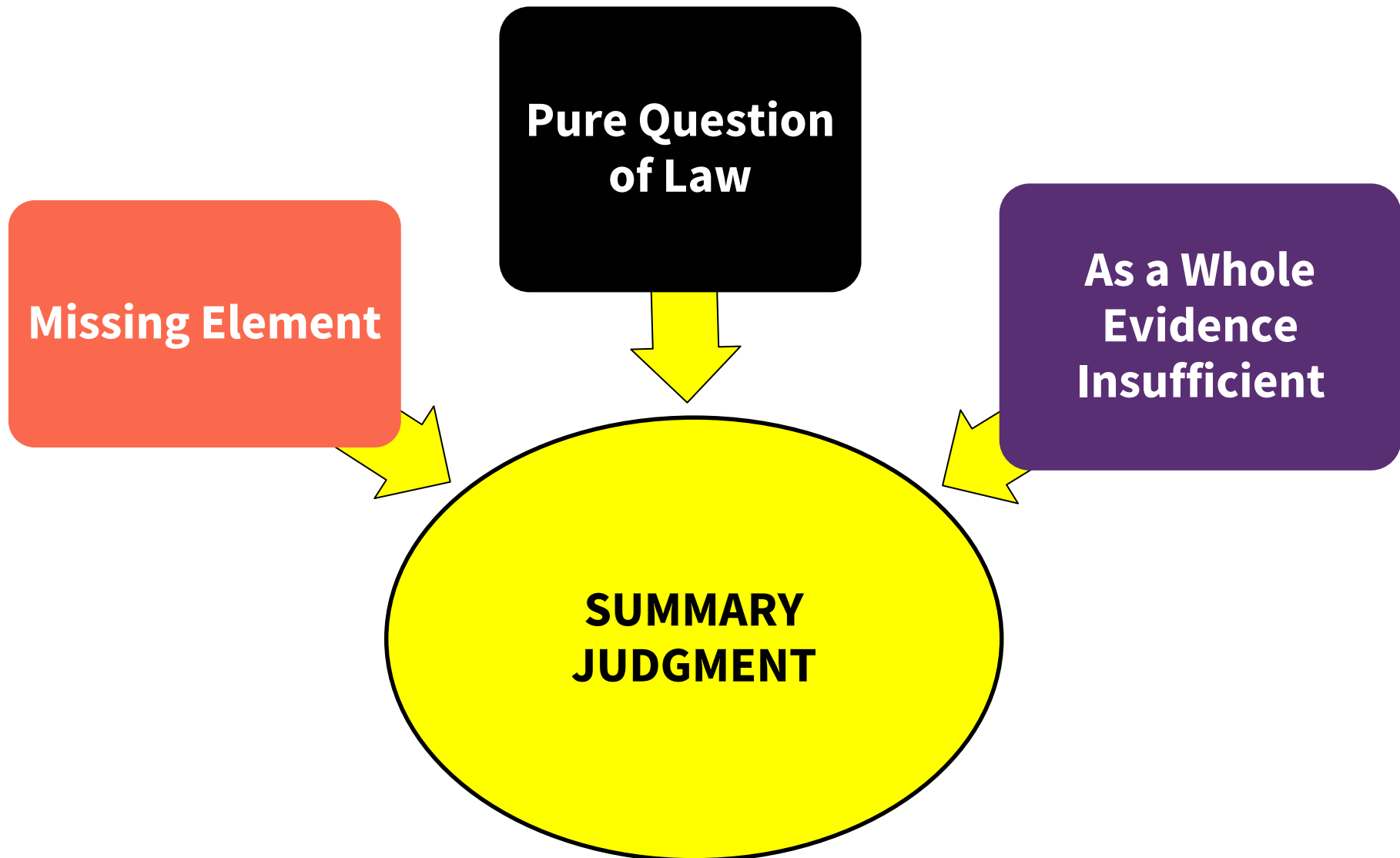
**Monell  
Policy**

**Multiple  
Defendants**

**Retaliation**

**Complex  
Claims**

# S/J Mining Tips



# “Hot” New Celotex Rulings

Summary judgment for lack of causation evidence proper on Art. 1802 negligence claim against hotel based on plaintiff's death while snorkeling.

*Baum-Holland v. Hilton El Con Mgt., LLC* (1<sup>st</sup> Cir. 2020) 964 F.3d 77

*Conclusory evidence that injury substantially limited major life activities insufficient to survive summary judgment.*

*Mancini v. City of Providence* (1<sup>st</sup> Cir. 2018) 909 F.3d 32

*Summary judgment denied to employer “who selectively cleans house (hiding) behind convenient euphemisms such as ‘downsizing’ or ‘streamlining.’” but granted as to harassment claim due to lack of severity.*

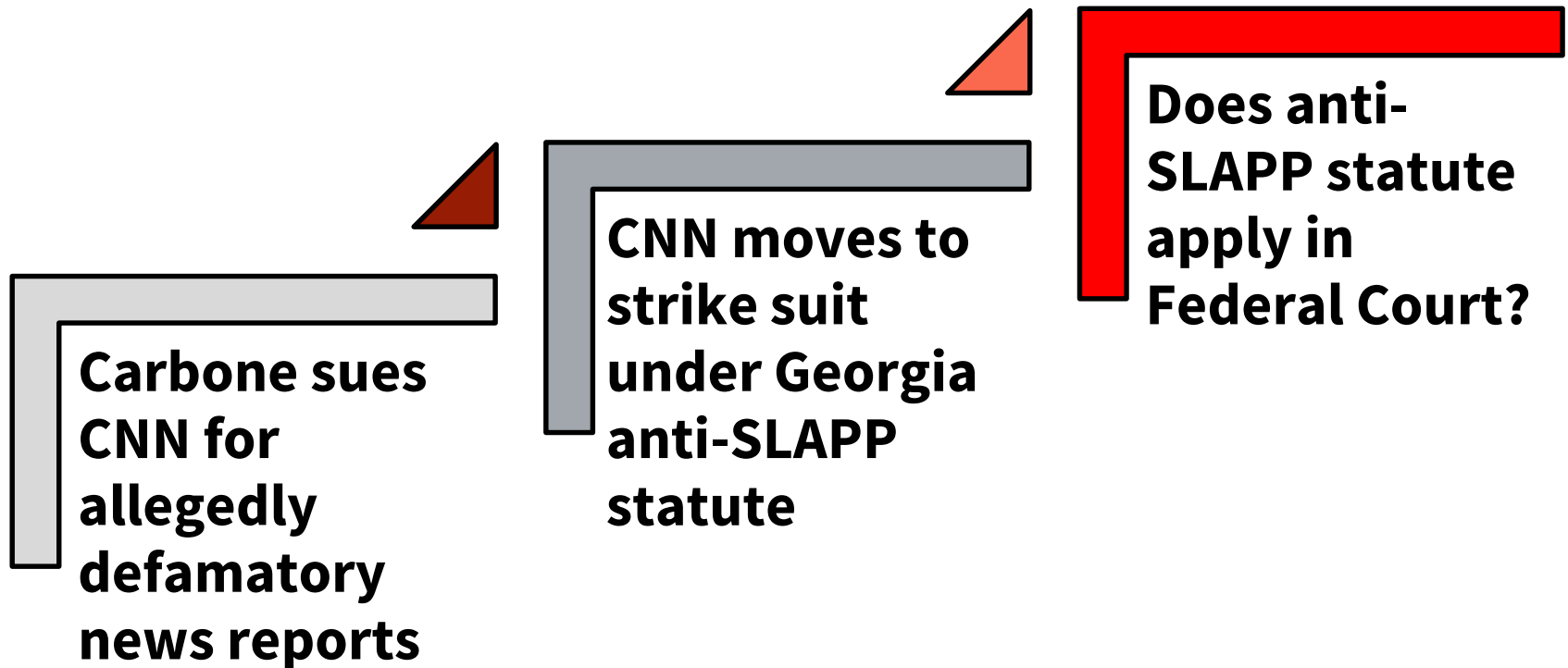
*Acevedo-Milan v. Home Etc.* (D. P.R. 2020) (Gelpi, J.)

# **Golden Nugget #10**

## ***Erie: Substance or Procedure?***

***Carbone v. Cable News  
Network, Inc. (11<sup>th</sup> Cir.  
2018) 910 F.3d 1345***

# State Anti-SLAPP Substantive?



*Oliver Wendell  
Holmes  
(dissent)*



"The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign that can be identified"

MARCH 2019

## Erie Railroad Rule on Brave New Track



As an experienced practitioner, you know that the Erie Railway rule is a complex thicket of legal issues, and it's not always clear how to apply the rule. The Erie Railway rule is a complex thicket of legal issues, and it's not always clear how to apply the rule. The Erie Railway rule is a complex thicket of legal issues, and it's not always clear how to apply the rule.

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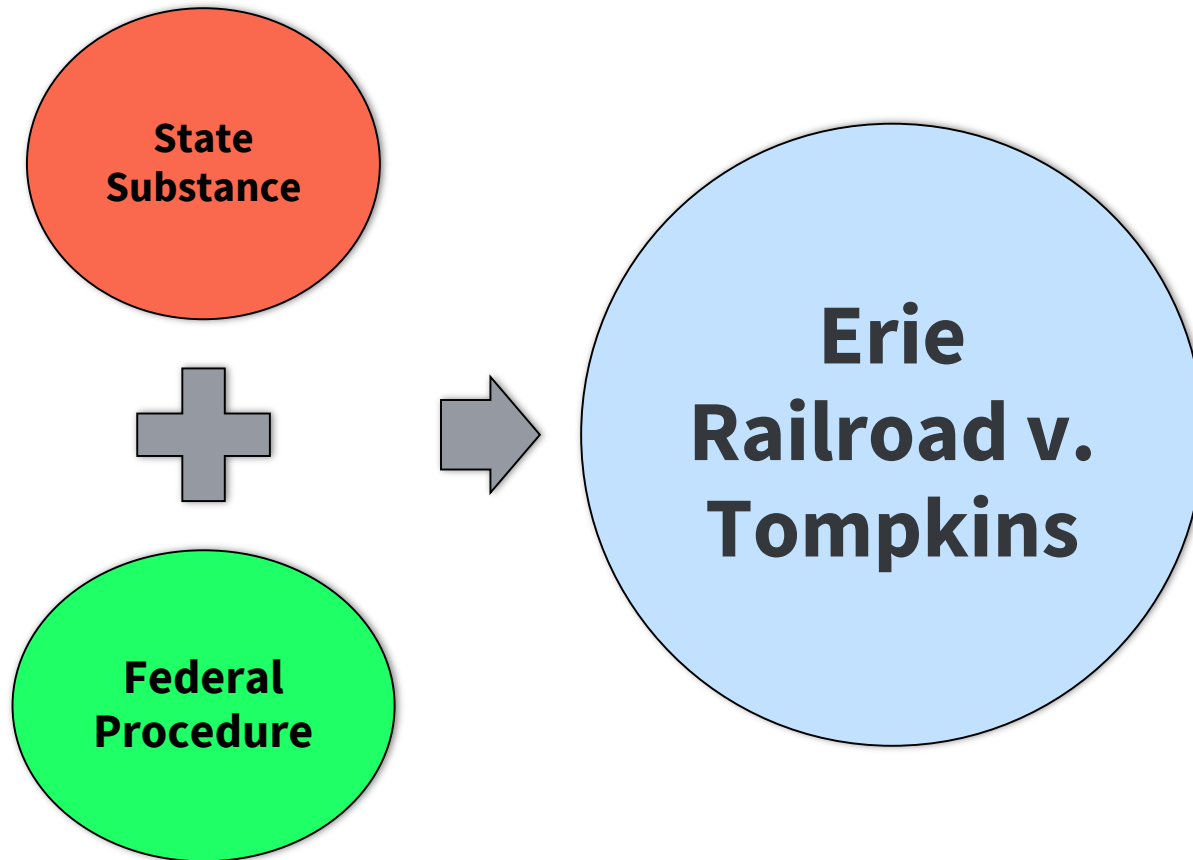


## Practice Guide: Federal Civil Procedure Before Trial

James M. Wagstaffe

LexisNexis

# State Claim in Federal Court

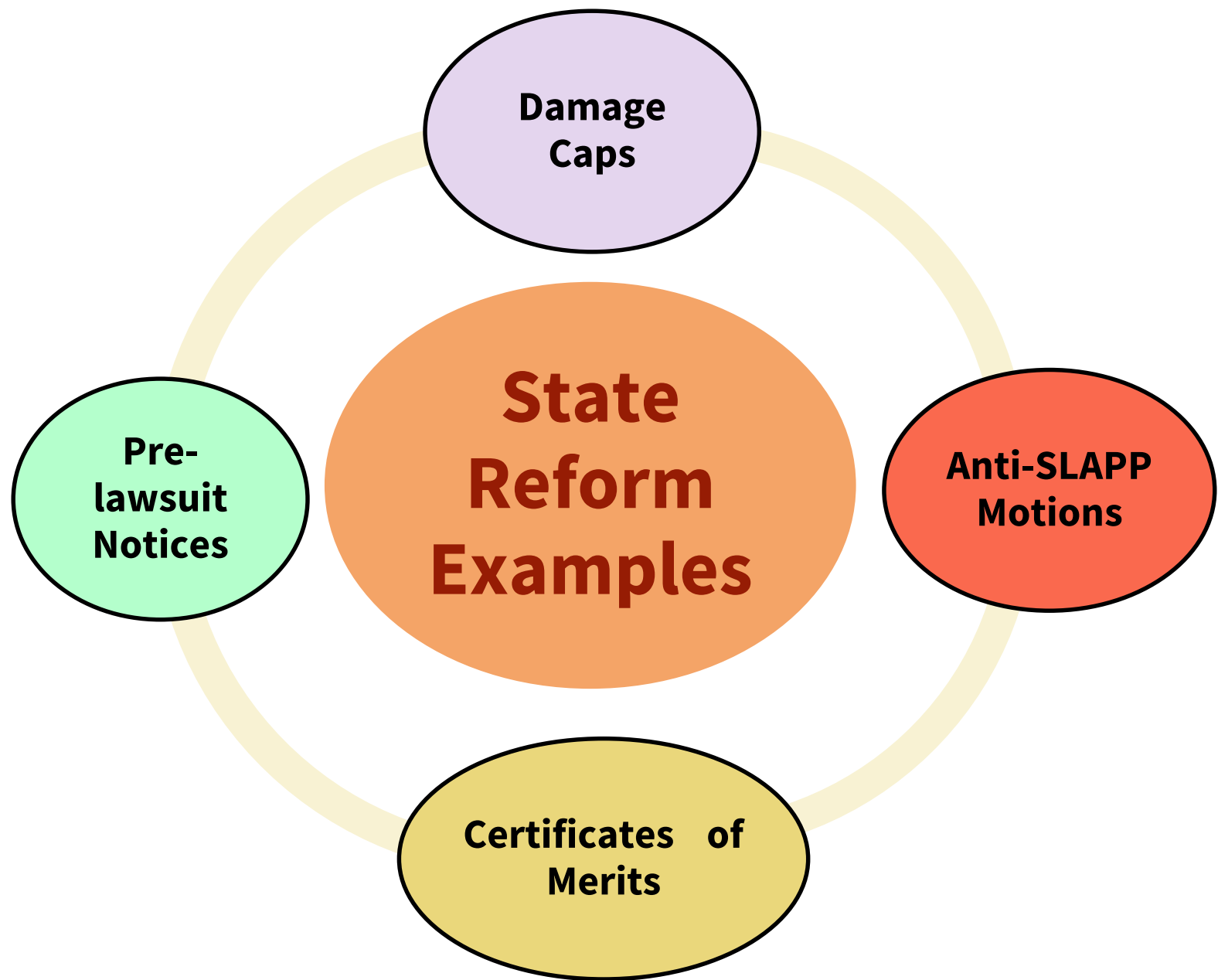


# No

***Carbone v. Cable News Network, Inc.* (11<sup>th</sup> Cir. 2018) 910 F.3d 1345**

**Fed. R. Civ. P. 8, 12 and 56 are on point and cover the disposition procedure**

**Note: Split of Authority in Circuits**



# State Anti-SLAPP Statutes Apply in Federal Court?

YES

**Planned Parenthood v. Center for Med. Progress (9<sup>th</sup> Cir. 2018);  
Godin v. Schencks (1<sup>st</sup> Cir. 2010)  
629 F.3d 79**

NO

***La Liberte v. Reid* (2d Cir. 2020) 966 F.3d 79; *Klocke v. Watson* (5<sup>th</sup> Cir. 2019) 936 F.3d 240; *Abbas v. Foreign Policy Group* (D.C. Cir. 2015) 783 F.3d 1328; *Carbone v. CNN* (11<sup>th</sup> Cir. 2018) 910 F.3d 1345; *Los Lobos Renewable Power v. Americulture*, (10<sup>th</sup> Cir. 2018) 885 F.3d 659**

# State Certificate of Merits Statutes Apply in Federal Court?

YES

*Liggon-Redding v. Estate of Sugarman*  
(3d Cir. 2011) 659 F.3d 258; *Hahn v.*  
*Walsh* (7<sup>th</sup> Cir. 2014) 762 F.3d 617

NO

*Young v. U.S.* (7<sup>th</sup> Cir. 2019) 942 F.3d  
349; *Gallivan v. US* (6<sup>th</sup> Cir. 2019) 943  
F.3d 291

# State Procedure Serving Specific Substantive Goal

Intention to influence substantive outcome manifest



Goal defeated if not applied in federal diversity suit

*Suero-Algarin v. CMT Hosp. Hospital* (1<sup>st</sup> Cir. 2020) 957 F.3d 30—court applies federal “shock the conscience” standard for new trials evaluating excessiveness of damages and Puerto Rico’s “exaggeratedly high” test not a different standard for *Erie* purposes

# Miner's Tip

**Don't Live in the Past**



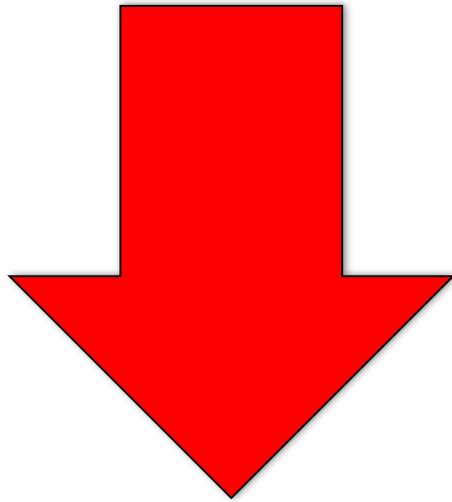
# Hot New Golden Nugget

## Rule 30(b)(6)



**Amendment Effective**

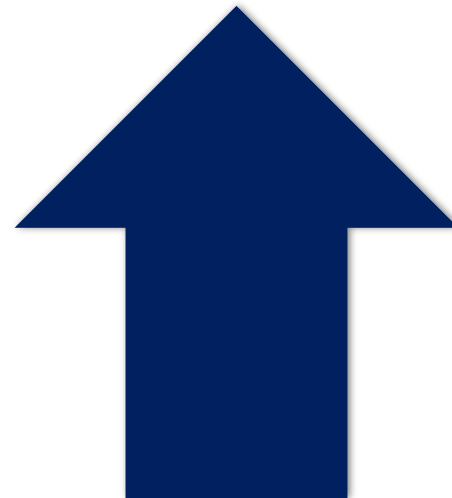
**December 1, 2020**



**Conferral  
Mandate for  
Corporate  
Designee  
Depos**



**Re: Confer in Good  
Faith About the  
Matters for  
Examination**

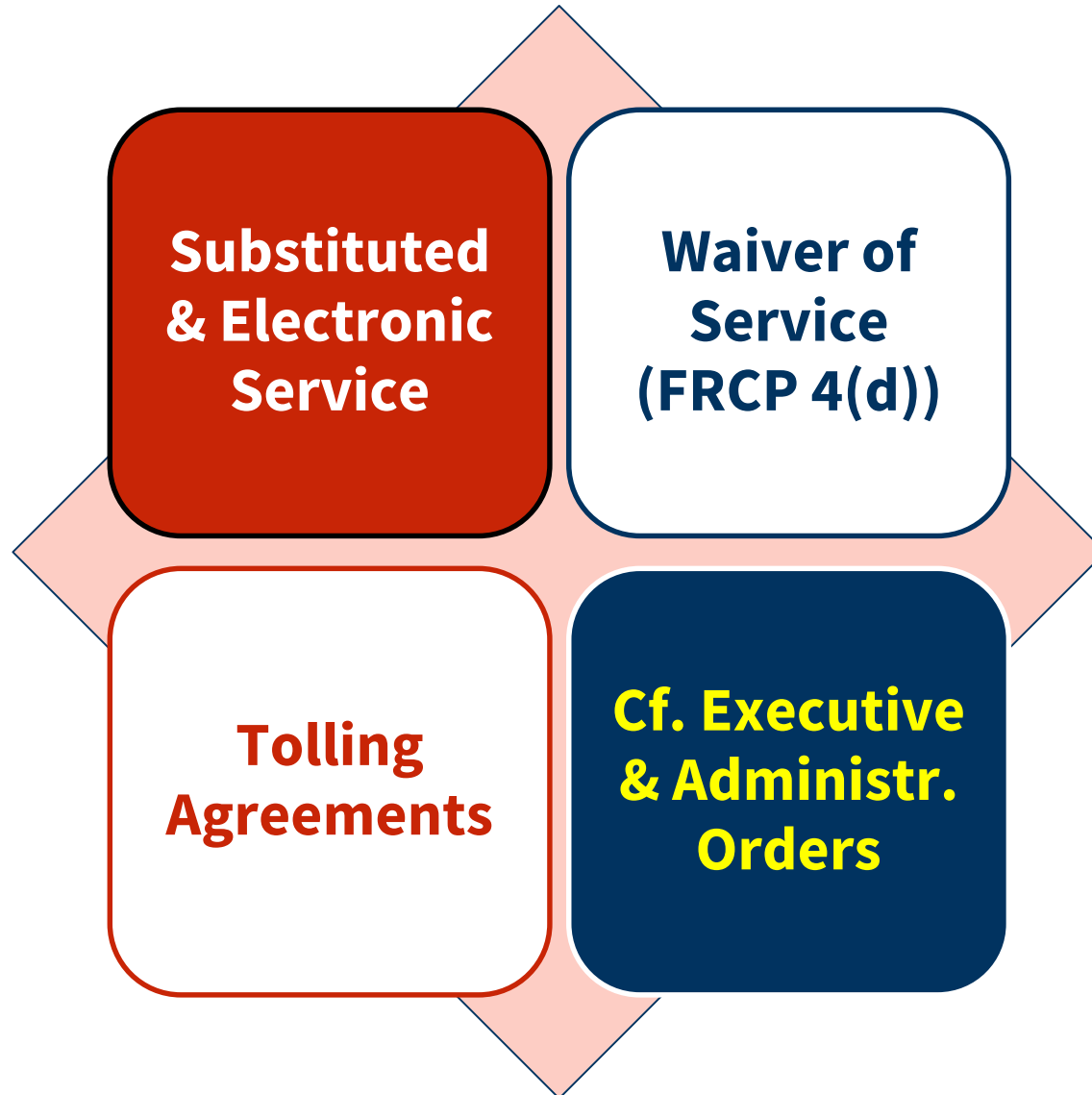


# Covid-2020 Mining



## Virtual World Litigation

# Stipulations (FRCP 29)



# Appear Virtually

**Courts**  
**Arbitrations**  
**Mediations**

*See J. Wagstaffe, “7 Steps to  
Romancing the Virtual Classroom”  
(Law360 May 2019)*

# Testify Virtually

## **Trials**

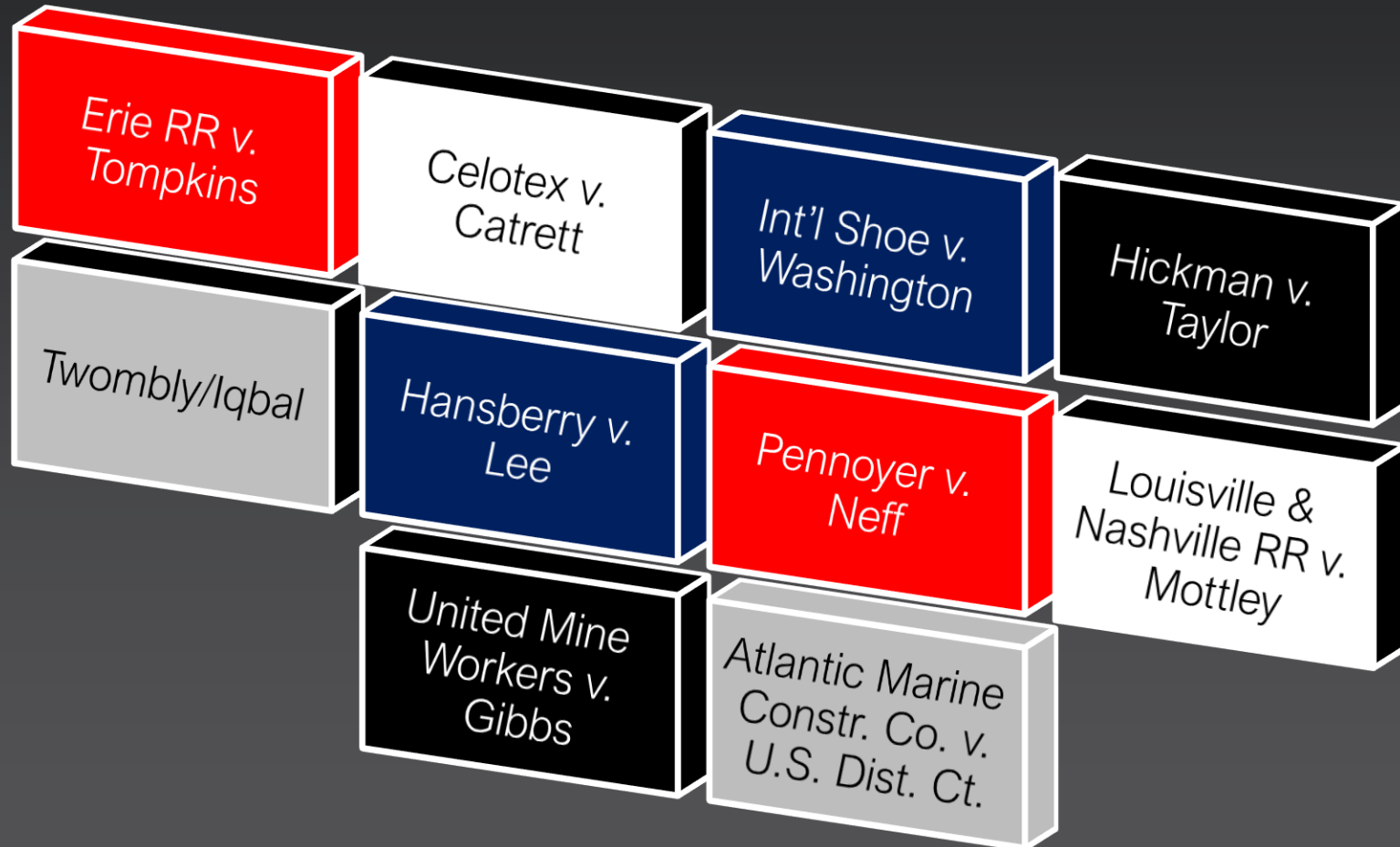
**(FRCP 43(a))**

## **Depositions**

**(FRCP 30(b)(4))**

***See J. Wagstaffe, “Presenting Witnesses Virtually in 21<sup>st</sup> Century Trials” (LN Advance, August 2019); M. Hindman, FJC Research Appendix on Remote Testimony (2017)***

# TWG's Top 10 Cases



**Let TWG Help You Mine Your Next  
Golden Nugget!!**



Use it/Cite it:  
**The Wagstaffe  
Group Practice  
Guide**

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**Current  
Awareness**

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